(28,333)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 378.

ROSENBERG BROS. & COMPANY, INC., PLAINTIFF IN ERROR,

vs.

CURTIS BROWN COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Order to show cause	1	1
Summons	3	2
Affidavit of J. Leslie Seidenbach	4	2
Curtis Brown	8	4
Jacob H. Corn	11	6
Maurice Strauss	14	8
Exhibit A—Financial statement of Brown & Blazer Clothing Co.	30	13
B—Semi-annual inventory, February 5, 1917, statement	32	15
C—Letter, Brown to Rosenberg Brothers Co., May 10, 1918	33	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 26, 1921.

	Original.	Print.
Exhibit D—Letter, Brown to Rosenberg Bros. & Co., October 31, 1918	34	16
E—Statement of Curtis Brown Co., December 27, 1919	35	17
Affidavit of Edward Rosenberg	36	18
Exhibit 1—Letter, Fashion Park to Curtis Brown Co.	43	23
2—Letter, Curtis Brown Co. to Fashion Park, May 25, 1920	44	23
3—Letter, Fashion Park to Curtis Brown Co.	45	24
4—Letter, Lipmann to Curtis Brown Co., August 20, 1920	46	24
5—Letter to Curtis Brown, August 24, 1920	47	25
6—Letter, Curtis Brown to Rosenberg Bros. & Co., September 4, 1920	48	25
7—Telegram, Fashion Park to Curtis Brown Co., September 7, 1920	49	26
8—Letter, Fashion Park to Curtis Brown, September 14, 1920	50	26
9—Letter to Curtis Brown, September 21, 1920	51	27
10—Letter, Curtis Brown to Rosenberg Bros. & Co., September 29, 1920	52	27
11—Letter, Fashion Park to Curtis Brown, October 4, 1920	53	28
12—Telegram, Rosenberg to Curtis Brown, September 9, 1920	55	30
13—Letter, Curtis Brown to Rosenberg, October 20, 1920	56	30
14—Letter, Rosenberg Bros. & Co. to Curtis Brown, October 27, 1920	58	32
Affidavit of A. Ivan Brickner	59	32
Order of State court appointing referee to take depositions	65	35
Testimony of E. W. Bill	68	36
Testimony of James S. Whitelaw	87	46
Exhibit B-4—Express receipt	110	60
B-5—Shipping directions	112	61
B-2—Express receipt	112	61
B-6—Shipping directions	113	62
B-3—Express receipt	113	62
B-7—Shipping directions	115	63
B-8—Letter, Curtis Brown to Whitelaw, January 18, 1921	116	64
B-9—Statement of payment	117	64
Letter, Curtis Brown to Bill & Caldwell, January 27, 1921	118	65
B-7—Shipping directions	119	65
Bill of lading	120	65
D 2—Letter to Bill & Caldwell, July 9, 1920	121	65
A-7—Invoice of Bill & Caldwell	122	65
Exhibits A-4 and A-5—Orders of Curtis Brown Co. to Bill & Caldwell, January 4, 1921	123	65

	Original.	Print.
Exhibits A-3, A-2, and A-1—Invoices of Bill and Caldwell, January 4, 1920	125	65
Testimony of St. Clair Burns	128	66
Testimony of Robert A. Holmes	138	72
Exhibit C 1—Memorandum of order	152	81
C 2—Telegram, Burns to Brown, January 10, 1921.	153	81
C 8—Memorandum	154	82
C 11—Letter, Crofut & Knapp to Holmes, January 8, 1921	155	82
C 12—Telegram, Curtis Brown to Crofut & Knapp, January 12, 1921	156	83
C 3—Order of Curtis Brown Co. for goods, October 8, 1920	157	83
Exhibits C 4, C 5, C 6, C 9—Invoices of Crofut & Knapp Co., &c	158	83
Exhibit C 10—Order of Curtis Brown Co. for goods, January 5, 1921	162	83
Testimony of Louis Lask	163	84
Exhibit K—Letter, Blum & Koch, Inc., to Curtis Brown Co., December 27, 1920	164	85
K 1—Letter, Blum & Koch to Curtis Brown, December 27, 1910	176	92
K 2—Invoice of Blum & Koch	177	92
K 3—Invoice of Blum & Koch	178	93
K 4—Invoice of Blum & Koch	179	94
K 5—Invoice of Blum & Koch	182	95
K 6—Invoice of Blum & Koch	183	96
K 7—Invoice of Blum & Koch	184	97
K 8—Letter, Curtis Brown Co. to Blum & Koch, October 30, 1920	185	98
K 9—Letter, Curtis Brown Co. to Blum & Koch, December 2, 1920	186	99
K 10—Letter, Curtis Brown Co. to Blum & Koch, December 10, 1920	187	100
K 11—Letter, Blum & Koch to Curtis Brown Co., November 3, 1920	188	100
Exhibits K 12-K 13—Letter, Blum & Koch to Curtis Brown Co., December 7, 1920	189	101
Exhibit K 14—Letter, Blum & Koch to Curtis Brown, December 17, 1920	191	102
K 15—Letter, Blum & Koch to Curtis Brown, December 18, 1920	192	103
K 20—Invoice, Blum & Koch	193	103
K 21—Specifications of order, &c	194	103
K 22—Specifications of order, &c	195	103
K 23—Specifications of order, &c	196	103
Testimony of Abraham L. Rechold	197	104
John P. Ahrens	207	110
Helen Marie Donovan	214	115
Clerk's certificates to depositions	222	125

	Original.	Print.
Affidavit of Curtis Brown	225	122
Arthur A. Brown	236	128
Claude Shelton	239	130
Petition for removal	242	131
Affidavit of Jacob H. Corn	247	134
Bond for removal	249	134
Opinion, Hazel, J.	253	137
Judgment	258	139
Assignment of error	262	141
Petition for writ of error and allowance	264	141
Certificate of jurisdictional question	266	142
Writ of error	269	143
Citation	271	144
Stipulation as to record	273	144
Clerk's certificate	277	146

1 Supreme Court of the State of New York, Monroe County.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

On the summons herein dated January 3, 1921, and on the affidavit of Curtis Brown, verified the 15th day of January, 1921, and on the affidavit of J. Leslie Seindenbach, verified the 18th day of January, 1921, and on the affidavit of Jacob H. Corn verified the 19th day of January, 1921,

Let the plaintiff or its attorneys show cause before one of the justices of the Supreme Court of the State of New York, at Special Term for motions, to be held at the court house in the city of Rochester, in and for the county of Monroe, on Saturday, January 22, 1921, at the opening of court on said day or as soon thereafter as counsel can be heard, why the alleged service of the summons in this action, by delivery of an alleged copy thereof to Curtis Brown, the president thereof, should not be set aside and declared to be invalid upon the ground that the said defendant is a foreign corporation organized under the laws of the State of Oklahoma, and that it does not reside in the State of New York and has no office therein, and does not transact business within the state of New York, and that said Curtis Brown, when served, was not within the State of New York on any business of the corporation, and on the

2 ground that such service and the attempted commencement of said action was in violation of the provisions of the Constitution of the United States, forbidding any judgment to be entered without due process of law, and on the ground that any judgment attempted to be entered upon such alleged service would be null and void, and why the defendant should not have such other and further relief in the premises as may be just and proper.

Sufficient reason appearing therefor, let service of this order to show cause, by mailing a true copy thereof and of the affidavits upon which same is founded, to the plaintiff's attorneys, Messrs. Werner & Harris, 619 Insurance Building, Rochester, Monroe County, N. Y., on the 19th day of February, 1921 be deemed sufficient service.

Dated, New York, January 19, 1921.

EDWARD R. FINCH,
Justice of the Supreme Court of the State of New York.
J. S. C.

3 STATE OF NEW YORK,
Supreme Court,
County of Monroe:

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and, in case of your failure to appear or answer, Judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Monroe.

Dated this 3rd day of January, 1921.

WERNER & HARRIS,
Plaintiff's Attorneys.

Office & P. O. Address, 619 Insurance Building, Rochester, N. Y.

4 Supreme Court of the State of New York, County of Monroe.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

CITY, COUNTY & STATE OF NEW YORK, *ss:*

J. Leslie Seidenbach being duly sworn, deposes and says: I reside at Tulsa, Okla., and have for a number of years last past; I am personally acquainted with Curtis Brown, who also resides at Tulsa, Okla.; I have read his affidavit, verified the 15th day of January, 1921, attached to these motion papers, and sworn to before a notary public of Tulsa, Okla.; I am also personally acquainted with the notary public; I am personally familiar with the signature of Curtis Brown, having seen him write many times, and that the signature attached to the original affidavit is the original signature of Curtis Brown, and the signature of J. H. C. Hopkins, the notary public, is also his original signature, as I am also personally acquainted with him, and have been for a number of years, and have often seen him write, as he is in my employment at Tulsa, Okla.; about the 4th or 5th day of January, 1921, and just before leaving New York City to go to Tulsa, Okla., Curtis Brown handed me the summons which is annexed to these papers, and authorized me to employ an

attorney to appear specially for the purpose of moving to
5 set aside the service of said summons, and to do anything and everything in relation to said action to be commenced, that may be in the interest of the defendant; accordingly, in pursuance of said authorization, I have directed the firm of Siegel & Corn, counselors-at-law, of 51 Chambers Street, New York City, N. Y., to appear specially to move to set aside the attempted service of said summons on said 3rd day of January, 1921, upon the grounds stated in the proposed order to show cause herein presented.

I left Tulsa, Okla., on or about the 26th day of December, 1920; by reason of my intimate acquaintance with Curtis Brown, and my friendship with him, and by reason of the fact that my own business, known as Seidenbach's, a ladies' specialty store, is situated near the store of the Curtis Brown Company, which is a man's clothing business line, mine being at No. 119 South Main Street, and the Curtis Brown Company being at No. 220 South Main Street, and by reason of the fact that recently I had an occasion to cause an audit to be made of the books of the Curtis Brown Company, and had an intimate discussion with Mr. Brown and his brother Arthur Brown, who is the vice president of the company, concerning its affairs, I have an intimate personal knowledge of the fact that the said corporation, the Curtis Brown Company, is a foreign corporation organized under the laws of the state of Oklahoma; furthermore, I am the holder of a large block of stock of the said corporation, and as such stockholder, being thus heavily financially interested therein, although I occupy no official position in relation to said corporation other than a stockholder, I am in frequent conference with the president concerning the affairs of the cor-
6 poration, and *and* having seen its books and its papers, I know personally from such knowledge thus gained, that it is such a foreign corporation, and that it has never filed any certificate under section 15 or 16 of the General Corporation Law of the State of New York to authorize it to do business within the state, nor does anybody represent it within the State of New York, nor has it such managing agent or any agent therein, nor any place therein for the transaction of business, nor has it ever filed a designation in the office of the Secretary of State or elsewhere of a person upon whom process could be served in its behalf. All business relations between the Rosenberg Bros. & Company, Inc., the plaintiff, and the defendant, ceased some time ago, by reason of the fact that the Rosenberg Bros. & Company, Inc., wrote a letter to the Curtis Brown Company stating that it would not sell any goods to it as it made other arrangements to sell its goods in Tulsa, Okla., and that since at least two months prior to the attempted service of this summons, no business has been transacted between the plaintiff and the defendant. Defendant has no place of business in any state wheresoever, or anywhere except at said 220 South Main Street, Tulsa, Okla. To the best of my information and belief, it has no place for the transaction of business wheresoever within the State of New York, and I say this because if it had any, I would know of it in some manner or fashion. It has no employees or any manager or

managing agent or managing director or other representative within the State of New York; I left Tulsa on or about the 26th day of December, 1920 and just before leaving, I saw Curtis Brown and had a conversation with him in which he informed me that he was going from Tulsa to Chicago, Ill. on a business matter, and that he intended to complete his business at Chicago, Ill. in time to
7 join me in New York City and spend New Year's Eve with me—that is, to be with me for the purpose of a New Year's Eve celebration; accordingly, I met him on the afternoon of December 31st at the Pennsylvania Hotel, New York, and he told me he was going to stay here for the New Year's weekend, and would leave for Milwaukee early during the then coming week to keep an appointment out there; I was in his company most of the time, until he left New York, and at no time while he was in my company did he transact any business, either for himself or for the company; he left early during the first week of January, after leaving the summons with me, authorizing me to cause the company to appear specially to move to set aside the service as stated above; I have read through the affidavit he made dated January 15, 1921, annexed to these motion papers, and to the best of my information and belief, the said affidavit is true in all respects.

J. LESLIE SEIDENBACH.

Sworn to before me this 18th day of January, 1921.
LILLIAN M. DEASE,
Notary Public, Kings Co.

Cert. filed N. Y. Co. 442.

8 In the Supreme Court of the State of New York Sitting in and for the County of Monroe, Trial Term.

No. —.

ROSENBERG BROTHERS AND COMPANY, INCORPORATED, Plaintiffs,

vs.

CURTIS BROWN COMPANY, a Corporation, Defendant.

STATE OF OKLAHOMA,
Tulsa County, ss:

Curtis Brown of lawful age being duly sworn on his oath says that the defendant, Curtis Brown Company is a corporation, duly organized and existing under, and by virtue of the laws of the State of Oklahoma, and had been cuch corporation at all times mentioned in plaintiffs' petition. That at no time has the defendant corporation ever qualified to transact business in the State of New York, nor has it at any time ever had therein any agent or representative authorized to accept the service of process, or upon whom process might be served, nor has it at any time ever maintained any

office or place of business or had in said state any manager or managing director.

9 This affiant has at all times been president of said defendant corporation, which has never in any manner domesticated under the laws of the State of New York, but has at all times maintained its principal and only place of business at Tulsa, County of Tulsa, in the State of Oklahoma.

Affiant says that he is the identical person upon whom was served on January 3, 1921, the summons in the above entitled action. And that besides said summons so served upon affiant, no other process of any kind or character has ever been served in this cause. Affiant further says that at the time of the service of said summons upon him, (he was in the State of New York solely upon a personal pleasure trip having left Chicago, and gone to the City of New York for the purpose of spending New Year's Eve there, bent solely on personal pleasure.) That affiant had no business, and undertook to transact no business for the defendant corporation in the State of New York upon said trip, and that at the time of the service of process, as aforesaid, he was enjoying a personal visit of personal courtesy to Mr. Brickner, and not in any manner engaged in business of any kind or character.

Affiant further says that he was not present in New York at any time upon said trip during which said process was served for any purpose of the defendant corporation, nor in its interest, nor did he, during said trip, transact business for the defendant corporation, nor was he present in said State of New York in his capacity as president of said defendant corporation, but solely for personal amusement, pleasure and sociality: and affiant did not, during

10 said trip in the State of New York, perform any service for the defendant corporation, and was not in said State in such service, nor for any purpose of the corporation, or of service to the defendant corporation.

Affiant was not authorized to accept service in the State of New York of any process upon said corporation, nor had he in any manner been appointed for that purpose, and he did not accept such service, nor assume so to do.

Affiant further says that, at the time of the service of said process the defendant corporation had no business with Mr. Brickner, and the business relations between the defendant corporation, and the plaintiff were closed, long prior thereto. Further affiant saith not.

CURTIS BROWN.

Subscribed and sworn to before me this 15th day of January 1921.

J. H. HOPKINS,
Notary Public.

My commission expires July 18, 1922.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, O. D. Lawson, County Clerk within and for Tulsa County, State of Oklahoma, do hereby certify that J. H. C. Hopkins, whose name is subscribed to the deposition or certificate of the proof or acknowledgement of the annexed instrument, and thereon written, was, at the time of proof or acknowledgment of the annexed instrument and then written, was at the time of taking such deposition or proof and acknowledgment, a Notary Public, acting in and for the said county and duly commissioned and sworn, and authorized by the laws of said state to take depositions and also acknowledgments and proofs of deeds or conveyances of land, tenements or hereditaments in said State of Oklahoma. That there is on file in the Clerk's office of said County of Tulsa, State of Oklahoma, a certified copy of his appointment and qualification as Notary Public of the said county of Tulsa, and I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature of said deposition, or certificate of the proof, or acknowledgement is genuine.

In witness whereof, I have set my hand and affixed the seal of the County of Tulsa, State of Oklahoma this the 19 day of January A. D., 1921.

[Seal County Clerk, Tulsa County, Oklahoma.]

O. D. LAWSON,
County Clerk.
EW. CLARK,
Deputy.

11 Supreme Court of the State of New York, Monroe County.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

CITY, COUNTY & STATE OF NEW YORK, *ss:*

Jacob H. Corn, being duly sworn, deposes and says: that he is a member of the firm of Siegel & Corn, attorneys, 51 Chambers Street, Borough of Manhattan, New York City, and that he has been retained by the Curtis Brown Company to appear specially to move to set aside the attempted service of the summons referred to in the order to show cause herein, and the affidavits annexed hereto, and that the said Curtis Brown, the defendant, does hereby appear specially for the purpose of objecting to the jurisdiction of this court to proceed against the said Curtis Brown Company, and to move to set aside the attempted service of the summons on the

grounds stated in the annexed order to show cause, to wit: that it is a foreign corporation organized under the laws of the state of Oklahoma, and that it has no office for the transaction of business in New York, and that it transacts no business within the State of New York, and that the president is not authorized to accept service of the summons and that the president was not here on business of the corporation but on a pleasure trip, and on his own private, personal business, and that the corporation has no property within the state; and the grounds stated in the annexed proposed order
12 to show cause; that no previous application for the annexed order has ever been made; that your deponent prays that an order to show cause may be granted, instead of the usual notice of motion being given, for the reason that the summons having been served or attempted to have been served on the 3rd day of January, 1921, the last day to appear would be the 23rd day of January, 1921, and that it is desirable, if possible, to have the questions involved in this motion adjudicated before that time, and that deponent verily believes that this motion can only be brought on for hearing at the court house at Rochester on Saturday mornings, and that the next motion day would therefore be January 22, 1921.

Deponent further prays that a provision be put in the order to show cause, authorizing the submission of further affidavits in support of said motion, by service of copies thereof on the plaintiff's attorneys prior to the return day of the motion, inasmuch as it may possibly be desirable to present further affidavits.

Your deponent further prays for a provision authorizing the mailing of the order to show cause to the attorneys, who are Messrs. Werner & Harris, 619 Insurance Bldg., Rochester, Monroe County, N. Y.

JACOB H. CORN.

Sworn to before me this 19th day of January, 1921.

LILLIAN M. DEASE,
Notary Public, Kings Co.

Cert. filed N. Y. Co. 442.

13 [Endorsed:] Civ. 2023. Supreme Court, Monroe County. Rosenberg Bros. & Co., Inc., Plaintiff, against Curtis Brown Company, Defendant. Copy. Affidavits and Order to Show Cause. Siegel & Corn, Attorneys for deft., appearing specially, 51 Chambers Street, Borough of Manhattan, New York, N. Y. Filed Apr. 26, 1921. Harris S. Williams, Clerk.

14 Supreme Court, Monroe County.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

STATE OF NEW YORK,
County of Monroe,
City of Rochester, ss:

Maurice Strauss, being duly sworn, deposes and says:

I now reside and at all the times hereinafter mentioned have resided in the City of Rochester, County of Monroe, and State of New York. That I now am and have continuously been at all the times hereinafter mentioned the treasurer of the plaintiff.

The plaintiff is and was at all the times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of New York, and engaged in the manufacture and sale, at Rochester, New York, of a high grade special distinctive line of men's clothing at wholesale.

That the manufacturing plant and home offices of the plaintiff are located at Fashion Park, Portland Avenue, Rochester, New York; and that the plaintiff also maintains offices and sales rooms at 200 Fifth Avenue, in the City, County, and State of New York; that said offices and sales rooms in the City of New York aforesaid are under the general control, management, and supervision of Mr. Joseph Rice and Mr. A. Ivan Brickner, both of whom are employed by the plaintiff in connection with its Sales Department. The said A. Ivan Brickner now having charge and supervision, in addition to
15 his other duties, of plaintiff's sales to customers located in the States of Virginia, Texas, and the City of New York, and formerly, prior to 1919, having had charge of plaintiff's sales to customers located in the State of Oklahoma in addition.

I know the defendant. The defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Oklahoma and engaged, at Tulsa, Oklahoma, in the sale at retail of men's and boys' clothing, hats, and gents' furnishing goods.

I know Curtis C. Brown the President of the defendant. I first met him personally at the office of Rosenberg Bros. & Company, Fashion Park, Rochester, N. Y., on the 3rd day of January, 1918, when he, as the Secretary and Treasurer of Brown & Blazer Clothing Company, came to plaintiff's office at Rochester, New York, to negotiate with the plaintiff, through its Treasurer, for the sale by the plaintiff from season to season and year to year of plaintiff's line of clothing to the said Brown & Blazer Clothing Company.

For some time prior to and on the 3rd day of January, 1918, the plaintiff had been and was selling its line of clothing from season to season and from year to year to a customer other than the said Brown & Blazer Clothing Company, which said customer was en-

gaged in the retail clothing business at Tulsa, in the State of Oklahoma, but such arrangement had not proven satisfactory and desirable to the plaintiff, and the plaintiff was on the 3rd day of January, 1918, and had been contemplating a change.

That at some time between the 1st day of October, 1917, and the 1st day of December, 1917, deponent as Treasurer of the plaintiff had been requested by the said A. Ivan Brickner, in charge at that time of plaintiff's sales to customers located in the State of Oklahoma, to meet with the said Brickner and the said Curtis C. Brown, at
16 that time the Secretary and Treasurer of the said Brown & Blazer Clothing Company, for the purpose of negotiating relative to the sale of plaintiff's line of merchandise to the said Brown & Blazer Clothing Company, to be by it sold at retail at Tulsa, Oklahoma.

Immediately thereafter deponent, as Treasurer of the plaintiff, secured from the R. G. Dun & Company Mercantile Agency a report of the financial status of the said Brown & Blazer Clothing Company. A copy of the report which was delivered to the plaintiff on the 8th day of December, 1917, thus obtained from the Mercantile Agency of R. G. Dun & Company is attached hereto and made a part hereof, marked "Ex. A."

Thereafter and according to appointment and on the said 3rd day of January, 1918, the said Curtis C. Brown so representing the said Brown & Blazer Clothing Company as its Secretary and Treasurer, in company with said A. Ivan Brickner, did come to plaintiff's offices at Fashion Park, Portland Avenue, Rochester, N. Y., and then and there did negotiate with deponent as the Treasurer of the plaintiff for the transfer to the said Brown & Blazer Clothing Company of plaintiff's line of clothing, and did then and there negotiate for the sale by the plaintiff to the said Brown & Blazer Clothing Company of its said line of clothing from season to season, such clothing to be selected by the Brown & Blazer Clothing Company and ordered from the plaintiff, which said clothing was to be thereafter manufactured from season to season at Rochester, New York, and delivered to the Brown & Blazer Clothing Company f. o. b. cars, Rochester, N. Y.

At the said meeting on the said 3rd day of January, 1918, deponent first took up and discussed with the said Curtis C. Brown the data relative to its financial status, which deponent had ob-
17 tained from the Mercantile Agencies, and especially the said Ex. A, and the said Curtis C. Brown did, at that time, state to deponent that said Ex. A contained a true and accurate statement of the financial status of the said Brown & Blazer Clothing Company; that he, the said Curtis C. Brown, was the Secretary and Treasurer thereof, and that he held at least twenty-five shares of its capital stock; that the Brown & Blazer Clothing Company had an authorized capital of Seventy-five hundred dollars ($7,500.00), all of which was issued and outstanding. The said Curtis C. Brown also produced, and at that time delivered to deponent, a statement of the financial status of the said Brown & Blazer Clothing Company, which deponent requested the said Curtis C. Brown to sign, and the

said Curtis C. Brown did thereupon write at the bottom thereof the words "To Rosenberg Bros. & Company. January 3rd, 1918. (Signed) C. C. Brown." That a copy thereof is attached hereto and hereby made a part hereof, marked "Ex. B."

Deponent then explained to the said Curtis C. Brown that it was the plaintiff's policy to sell its line of clothing to but one customer in a city of the size of Tulsa, Oklahoma; that it had for some time been selling to another customer in that town its line of clothing, and that it would not be fair to break off such relations without giving such customer timely notice thereof and an opportunity of making a change to some other house selling a similar line, and that plaintiff would make no arrangements with the said Brown & Blazer Clothing Company for sales of its merchandise to it earlier than the Fall season of 1918. To this the said Brown & Blazer Clothing Company through the said Curtis C. Brown assented, and the said Curtis C. Brown, in behalf of the said Brown & Blazer Clothing Company, and deponent, in behalf of the plaintiff, then orally agreed that commencing with the Fall Season of 1918 the plaintiff would sell to the

18 said Brown & Blazer Clothing Company, and the said Brown & Blazer Clothing Company would purchase from the plaintiff, selections to be made on sample, merchandise to be manufactured by the plaintiff at Rochester, New York, and delivered to the said Brown & Blazer Clothing Company f. o. b. cars Rochester, New York, and to be paid for by the said Brown & Blazer Clothing Company to plaintiff at Rochester, New York, plaintiff's line of clothing for the season commencing in the Fall of 1918, upon the terms of credit then agreed upon.

That thereafter and in the Spring of 1918 the said Brown & Blazer Clothing Company did select, on sample, and did order from plaintiff, men's clothing to be manufactured by the plaintiff at Rochester, New York, for the said Brown & Blazer Clothing Company and to be delivered to it f. o. b. cars Rochester, New York, and did thereafter pay for the same to this plaintiff at Rochester, New York.

That in the due course of the mails and in the month of May, 1918, this plaintiff received from the said Brown & Blazer Clothing Company under date of May 10, 1918, a letter, a copy of which is annexed hereto and made a part hereof, marked "Ex. C."

That during the month of September, 1918, the said Brown & Blazer Clothing Company through the said Curtis C. Brown, its Secretary and Treasurer, did select, from sample, and order from plaintiff's line of merchandise, its requirements for the Spring and Summer of 1919, which the plaintiff, in turn, did manufacture at Rochester, New York, and deliver to the said Brown & Blazer Clothing Company, f. o. b. cars, Rochester, New York, and for which the said Brown & Blazer Clothing Company and its successor, the defendant, did pay the plaintiff at Rochester, New York.

19 That during the month of November, 1918, the plaintiff received in the due course of the mails a letter from the defendant signed by the said Curtis C. Brown for and in behalf of the said defendant, which said letter bears date October 31, 1918, a copy of which is annexed hereto and made a part hereof, marked "Ex. D."

That thereafter and on or about the 11th day of February, 1919, the said Curtis C. Brown personally visited the home office of the plaintiff at Fashion Park, Portland Avenue, Rochester, New York, for the purpose of going over and revising the order given by the Brown & Blazer Clothing Company, to which the said Curtis Brown Company had succeeded, and of purchasing from the plaintiff for the said Curtis Brown Company additional merchandise; and also, for the purpose of negotiating with deponent, as the Treasurer of the plaintiff, for a continuation to the Curtis Brown Company of the arrangement under which the plaintiff had previously been selling its line to the said Brown & Blazer Clothing Company.

That then and there this deponent, in behalf of the plaintiff, discussed with the said Curtis C. Brown, the then President of the said Curtis Brown Company, the financial status of the defendant, and the said Curtis C. Brown did then and there state to this deponent, representing the plaintiff, among other things, that he, the said Curtis C. Brown, was the President of the said Curtis Brown Company, the defendant, owning 69, ($6,900) shares of its author-
20 ized capital stock of $7,500.00; that the said Arthur A. Brown, owning 5 shares of its capital stock was his brother, and the said Claude Shelton, owning one share of stock, was a clerk of the defendant; and the said Curtis C. Brown, representing the defendant, and this deponent, representing the plaintiff, did then and there agree that the defendant should continue to handle plaintiff's line of clothing substantially in the same manner as the Brown & Blazer Clothing Company had theretofore handled the same.

That the plaintiff did thereafter during the Spring and Summer Season of 1919 manufacture at Rochester, New York, and deliver f. o. b. cars, Rochester, New York, to the said defendant the merchandise so ordered by the Brown & Blazer Clothing Company and by the defendant for such season, and the defendant did pay the plaintiff therefor at Rochester, New York, in accordance with the terms of the contract.

That in the Spring of 1919 the defendant did select and order men's clothing, on sample, from the plaintiff, from its line of merchandise for the Fall and Winter Season of 1919, and the plaintiff did manufacture such men's clothing at Rochester, New York, and deliver the same to the defendant f. o. b. cars Rochester, New York, the clothing so ordered for such season, and the defendant did pay the plaintiff at Rochester, New York, therefor.

That in the Fall of 1919 the defendant did select and order men's clothing, on sample, from the plaintiff for the Spring and Summer Season of 1920, and the plaintiff did manufacture the same at Rochester, New York, and deliver such men's clothing to the defendant f. o. b. cars, Rochester; New York, and the defendant did pay the plaintiff therefor at Rochester, New York.

21 That on or about the 12th day of February, 1920, plaintiff received from defendant, by mail, a statement of the financial status of defendant, a copy of which is annexed hereto and made a part hereof, marked "Ex. E"; that the figures at the bottom

and to the right of said statement—"1920—(opposite January) $18,400.00"—are in the handwriting of the said Curtis C. Brown.

That in the envelope containing Ex. "E" was a memorandum in the handwriting of the said Curtis C. Brown reading as follows:

"February 9, 1920.

"DEAR MR. STRAUSS:

Do you think it advisable for us to increase our capital stock to include our surplus?

Will be glad to have your opinion.

With kindest regards,

(Signed) BROWN."

That the said Curtis C. Brown, at different times when he was personally present in plaintiff's plant at Rochester, New York, has repeatedly stated to deponent that it was his practice to visit New York State for and in behalf of the defendant and as its President three or four times a year and for the purpose of purchasing merchandise, which custom he had found to be of advantage to defendant, and that among others the said defendant was purchasing in New York State of Snellenberg Clothing Company, Rosenwald & Weill, Bates Shirt Company, Crofut & Knapp, Kay & Einstein, Rain Wear, Centimira & Co., Mark Cross & Company, A. W. Cohen & Co., Phœnix K. Mills Co., George Fox & Co., Ansorge Bros., Heidelberg, Wolfe & Co., Bill & Caldwell, and Alexander Com-
22–28 pany, all of whom were either manufacturers located in the City, County, and State of New York or who had salesrooms there.

That deponent, of his own knowledge, knows that the said Curtis C. Brown, as the President of the defendant, since November of 1918, has been at least twice in the State of New York each year for the purpose of purchasing merchandise for the defendant; that the trips made by the said Curtis C. Brown for and in behalf of the defendant to purchase merchandise have customarily been made by him in the early part of January, and in the Spring months either of May or June, and the Fall months of September or October.

29 MAURICE STRAUSS.

Subscribed and sworn to before me this 2nd day of February, 1921.

HENRY BERMAN,

Notary Public.

30 Ex. "A".

Brown & Blazer Clothing Co., Retail, Tulsa, Okla.

Tulsa County.

Isadore E. Blazer, Pres.

S. A. Thomas, V. Pres.

Curtis C. Brown.

August 18, 1917.

Record.

Officers also from the Board of Directors. Oklahoma corporation, chartered October 15, 1915, with an authorized capital stock of $7,500 which is claimed fully paid. Succeeded the Agee Clothing Co. of which Blazer had been Secretary.

Isadore M. Blazer is about 42 years of age, married and said to own 49 shares of stock in this company. Is well regarded personally, attentive, industrio-s and of good ability.

S. A. Thomas is active in the management, holds one share and his means regarded small. Is of good character and hanits, attentive and of good ability.

Curtis C. Brown, holds 25 shares of stock, is well regarded personally, of good habits and of good ability.

Statements.

Dates.	Assets.	Liabilities.	Net worth.
Jan. 1916	$18,895.54	$8,596.02	$10,299.52

C. C. Brown, Sec. & Treas., sends in the following signed statement by mail received the 16th inst. as representing condition of business August 5, 1917:

Assets.		Liabilities.	
Mdse. worth 100 cents on the dollar	$39,964.94	Loans from bank..	$2,500.00
Fix. bought within past year	6,106.00	Bills payable.....	24,430.94
Accounts Recv. good	2,280.57		
Liberty bonds	200.00		
Co-partnership life ins.	808.90		
Advance rent.....	300.00		
Cash on hand.....	258.11		
Cash in bank.....	354.18		
Total	$50,272.60	Total	$26,930.94

Approximately $2,400, will be expended by us for a new store front with unexcelled display windows during the present month.

Comparative Business 1916-1917.

Month.	1916.	1917.	Gain.	Per cent gain.
January.....	$4,350.98	$8,066.25	$3,715.27	85½
February.....	3,090.41	5,747.88	2,657.47	86
March.....	3,417.48	6,204.80	2,787.32	83½
April.....	4,846.35	6,638.60	1,792.25	37
May.....	5,936.05	8,314.40	2,378.35	40
June.....	5,240.43	10,240.20	4,999.77	95½
July.....	7,863.74	10,881.90	3,018.16	38½
August 4 days..	828.35	2,159.10	1,330.77	160½

31 Brown & Blazer Clothing Co., Retail, Tulsa Okla.

Tulsa County.

Continuation of Report Dated August 18, 1917 Page #2.

General Information.

Statement was regarded entitled to favorable consideration, but indebtedness is regarded a little heavy and are regarded worth fully amount of paid *of* capital.

Have a good location on Main Street, doing a very fair business, management is careful and economical and operate at light expense. Prospects regarded favorable.

Trade Opinions.

Reported meeting their bills promptly and take advantage of discounts.

Fire Record.

None.

N. Y. 10-15-1917. C. R.

32 Ex. "B."

Satement of the Brown & Blazer Clothing Co.

Semi-Annual Inventory Feb. 5, 1917.

Assets.		Liabilities.	
Merchandise invoiced at net cost	$33,133.41	Central Nat. Bank...	$1,500
Fixtures, discounted 20%	4,171.95	American Nat. Bank.	2,000
Good Accounts	1,690.36	Notes, not due.....	6,201.04
Advance insurance..	93.15	Accounts payable ...	12,745.59
Advance Rent	263.00		$22,446.63
Cash in Bank.....	238.08		
Cash on Hand.....	108.03		
Insufficient checks..	187.20		
Labels adv. Mfgrs...	22.00		
Advance Advertising	42.00		
	$39,949.48		

All of the above indebtedness except the Bank has been paid except $1,083, at this time, May 18, 1917.

Cash business in 1916, $71,000.

Dec. 1916 showed 64% increase over Dec. 1915.
Jan. 1917 showed 86% increase over Jan. 1916.
Feb. 1917 showed 85½% increase over Feb. 1916.
Mar. 1917 showed 83¾% increase over Mar. 1916.
April 1917 showed 37% increase over April 1916.
May 18 days only shows 43% increase over first 18 days May 1916.

To Rosenberg Bros. Company, Jan. 3d, 1918.
(Signed) C. C. BROWN.

33 Ex. "C."

Rosenberg Brothers & Co.,
Fashion Park,
Rochester.

GENTLEMEN:

We have misplaced our memo. of the terms under which we accepted our Fall and Winter orders.
Will you kindly furnish us copy of same for our files?
Yours very truly,

BROWN & BLAZER,
(Signed) By C. C. BROWN.

May 10, 1918.
C. C. B./K. L.

Mr. Strauss:

For the first 19 weeks of 1918, our business shows an increase of $17,000.00 over the same period of 1917. We hope to do $60,000.00 increase for the year.

(Signed) C. C. B.

34 Ex. "D."

Brown & Blazer,

A Quality Shop for Men,

Tulsa, Okla.

October 31, 1918.

Rosenberg Bros. & Co.,
Fashion Park, Rochester, N. Y.

GENTLEMEN:

Answering yours of the 15th I am pleased to inform you that I now own all of the stock of the Brown & Blazer Clothing Co., Inc. I purchased Mr. Blazer's one-half interest in same out of my personal funds, and the finances of the company were in no way affected. We have enjoyed a $10,000.00 business in the past seven days, and it is my intention to materially reduce the stock on hands, thus giving a larger turn over and I am very confident that we will be able to discount all bills around the first of the year.

We will furnish you with a detailed statement of the year's business, as well as our financial condition at the close of 1918.

Assuring you of our appreciation in serving us so promptly and efficiently and satisfactorily, we are,

Yours very truly,

CURTIS BROWN CO.

(Signed) By CURTIS BROWN.

C. C. B.—A. C. M.

35 Ex. "E."

Statement of

Curtis Brown Company,

Tulsa, Okla.

Dec. 27, 1919.

Merchandise on Hand	$92,579.32
Cash on hand and in Bank	3,006.15
Accounts, receivable, C. O. D's	766.91
Accounts, receivable, Charges	3,455.24
Furniture and Fixtures	13,972.73
Life Insurance	1,407.00
Investment, Rosenberg Bros. & Co. Stock	1,000.00
Notes, Receivable, secured	300.00
Liberty Bonds	224.75
Deferred Charges, prepaid rent etc.	1,350.00
	$108,062.10
Accounts payable, Eastern open accounts	$18,501.77
Bills payable, Bank	12,000.00
Bills payable, Curtis C. Brown	10,000.00
Reserve for Furniture and Fixtures	2,697.94
City Bills and Misc.	2,099.26
Surplus	55,263.13
Capital	7,500.00
	$108,062.10

Stockholders.

Curtis C. Brown, 69 shares	$6,900.00
Arthur A. Brown, Secy.-Treas., 5 shares	500.00
Claude Shelton, V. Pres., 1 share	100.00
	7,500.00

Insurance.

Fire Insurance on Stock	$91,000.00
Fire Insurance on Fixtures	15,000.00
Open Stock mercantile burglary	4,000.00
Safe burglary	4,000.00
Outside messenger robbery	3,000.00
Curtis C. Brown, Life Insurance	20,000.00
Riot Insurance	75,000.00

Comparative Cash Sales.

	1917.	1918.	1919.	1920.
Jan.	$8,066.25	11,808.20	11,371.13	18,400.00
Feb.	5,747.88	10,510.30	6,362.55	
Mar.	6,204.80	9,637.60	9,647.46	
Apr.	6,638.60	8,173.15	23,883.94	
May	8,314.40	12,071.75	14,636.73	
Jun.	10,240.20	11,683.50	18,634.43	
Jul.	10,881.90	10,583.75	21,104.00	
Aug.	7,653.00	9,619.05	11,987.49	
Sep.	8,667.85	8,439.45	12,837.67	
Oct.	11,020.65	17,921.32	20,981.98	
Nov.	10,112.00	20,832.00	24,356.62	
Dec.	23,469.00	23,261.72	41,488.63	
	$117,016.53	$154,541.79	$217,292.63	

36 Supreme Court, County of Monroe.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

Edward Rosenberg, being duly sworn, deposes and says:

I now reside and have at all the times hereinafter mentioned resided in the City of Rochester, County of Monroe and State of New York. I am now and was at all times hereinafter mentioned the President of the plaintiff corporation, which is engaged in the manufacture and sale at wholesale of a high grade distinctive line of men's clothing.

The volume of plaintiff's business during the year 1920 was in excess of ten million dollars ($10,000,000.00).

In the discharge of my duties I have general supervision and management of plaintiff's business. Maurice Strauss is the Secretary and Treasurer of the plaintiff and has general charge, control, and supervision of its finances and of the credit department of said business. Harry C. D'Annunzio is one of its directors, its chief designer, and is in the supervision, control, and management of its manufacturing business. Daniel C. Lippmann is one of the plaintiff's directors and is in general supervision, charge, and control of the sales department of its business.

The plaintiff manufactures its products at Rochester, New
37 York, and from season to season sells on sample its merchandise thereafter to be manufactured at Rochester, N. Y., and delivered to its customers f. o. b. cars, Rochester, New York. Plain-

tiff's customers are located throughout the United States and Canada. It is plaintiff's policy to sell to but one customer located in any city or town in the United States or Canada having a population of 300,000 or less.

The plaintiff's manufacturing plant and home offices are located at Fashion Park, Portland Avenue, Rochester, New York, and it also maintains offices and sales rooms at 200 Fifth Avenue, New York City.

I knew the Brown & Blazer Clothing Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oklahoma, which did business with the plaintiff from the 3rd day of January, 1918, to and including November of 1918; and I know the Curtis Brown Company, the defendant, which is an Oklahoma corporation, and which succeeded to the business of the said Brown & Blazer Clothing Company.

I know Curtis C. Brown, who was the Secretary and Treasurer of the said Brown & Blazer Clothing Company and who is the president and the owner of all but six shares of the capital stock of the defendant.

I became acquainted with said Curtis C. Brown on or about the 3rd day of January, 1918, when he first visited plaintiff's office at Fashion Park, Portland Avenue, Rochester, N. Y., for the purpose of making a contract with the plaintiff in behalf of the said Brown & Blazer Clothing Company, under and by virtue of which plaintiff's line of clothing was thereafter, commencing in the Fall Season of 1918, to be sold to the said Brown & Blazer Clothing Company. Such clothing to be selected and ordered by the said Brown & Blazer Clothing Company from season to season on sample, and thereafter to be manufactured by the plaintiff at Rochester, New York, to be delivered to the said Brown & Blazer Clothing Company, f. o. b. cars, Rochester, New York.

37½ The arrangement and contract so made by and between the said Brown & Blazer Clothing Company with the plaintiff on the 3rd day of January, 1918, was continued by the said Brown & Blazer Clothing Company during its existence, and thereafter by the defendant up to and until the Fall and Winter Season of 1920, as stated in the affidavit of Maurice Strauss, plaintiff's treasurer, which I have read and the contents of which I know.

That during the period above mentioned the said Curtis C. Brown visited plaintiff's manufacturing plant at Rochester, N. Y., at least twice each year and I personally saw him on the occasions of his visits here, on each of which occasions I met him and had some discussions and conferences with him.

That on or about the 26th day of April, 1920, Mr. B. Thomas, who was then in plaintiff's employ and who had supervision of its sales to plaintiff's customers residing in the State of Oklahoma, displayed plaintiff's line of sample clothing to be manufactured for the Fall and Winter Season of 1920 to the defendant at Tulsa, Oklahoma, and the said defendant, by Curtis C. Brown, its president, did select and order, subject to confirmation and acceptance by plaintiff, from such samples, 635 garments of the aggregate price of $35,-

723.50. That said order was in writing and contained the lot numbers of the samples from which such selections were so made, together with the quantity of garments, the price of each, the style, the description of the garment, the sizes thereof, and the method of manufacture—one duplicate of which was delivered to the defendant, and the other duplicate of which was retained by the said Thomas for the plaintiff, and said selection and order so given by the defendant through the said Curtis C. Brown to the plaintiff through
38 the said Thomas was accepted by the said Thomas to be transmitted to the plaintiff's home office and subject to confirmation and approval by the plaintiff.

That the said Thomas thereafter transmitted the duplicate order so retained by him for the plaintiff to the plaintiff, and the plaintiff upon the receipt of the same acknowledged to the defendant the receipt of said order, which it agreed to accept, subject, however, to deliveries not exceeding seventy-five per cent threof. A copy of such acknowledgment is attached hereto and made a part hereof, marked "Ex. 1."

That at the time said order was so received by the plaintiff it was very difficult to procure merchandise from the mills for the purpose of meeting plaintiff's requirements, and plaintiff for a time was even unable to send on reference swatches of the goods so selected by the defendant, and such swatches having not been received by the defendant on May 25th, 1920, the defendant wrote plaintiff a letter, a copy of which is annexed hereto and made a part hereof, marked "Ex. 2", which plaintiff received on the 28th day of May, 1920, and immediately thereupon forwarded the reference swatches in question to the defendant.

That upon the 23rd day of June, 1920, the said Curtis C. Brown as president of the defendant, and the defendant by Curtis C. Brown, its president, entered plaintiff's manufacturing plant at Fashion Park, Portland Avenue, Rochester, New York, and saw this deponent as the president of the plaintiff. That then and there the said Curtis C. Brown, the president of the defendant, stated to deponent that he had come to Rochester for the purpose of revising the order which the defendant had given to the plaintiff on or about the said 26th day of April, 1920. That the said Curtis C. Brown then
39 had with him the duplicate original order which had been retained by the defendant on the said 26th day of April, 1920; that deponent obtained from the plaintiff's files the duplicate of said order retained by the plaintiff, and deponent also secured from the files and records of the plaintiff an exact record of the manufacturing conditions relative to said order, which said data and records disclosed exactly what merchandise the plaintiff had been able to secure, what cloths had then been cut on account of said order, and what of said order was in process of work, and the nature and extent of such work which deponent, as the President of the plaintiff, showed and fully disclosed to the said defendant through the said Curtis C. Brown, its President. And the plaintiff and defendant did then and there agree to revise said order and did revise the same by canceling therefrom 75 garments of the aggregate price

of $4,897.50 of the kind and description therein enumerated; and the said defendant did then and there confirm the remainder of said order; and the said plaintiff and defendant did then and there agree to substitute in place and stead of the garments so cancelled and in addition to the order so given on the 26th day of April, 1920, 107 garments of the aggregate price of $4,924.00, the lot number, quantity, price, style, description, sizes, and method of manufacture of each were embodied in an order under date of June 23rd, 1921, supplemental to the said order of April 26th, one duplicate of which was given to the said defendant by delivering the same to the said Curtis C. Brown, and the other duplicate of which was retained by the plaintiff.

That all of the said merchandise so described in the said order under date of April 26th, 1920, as revised on the said 23rd day of June, 1920, and the order supplemental thereto under date of June 23rd, 1920, the plaintiff, by deponent, agreed with the de-
40 fendant to manufacture for it, at Rochester, New York, to the extent that plaintiff should be able to secure piece goods from the mills to manufacture the uncut portion of said order on the said 23rd day of June, 1920, and to deliver the merchandise so manufactured to the defendant f. o. b. cars, Rochester, New York, for the Fall and Winter Season of 1920, and the defendant, through the said Curtis C. Brown, its President, did then and there agree to accept the same as manufactured for the Fall and Winter season of 1920, and to pay therefor to the plaintiff at Rochester, New York, on the regular terms of payment which had been previously established.

That on or about the 1st day of September, 1920, plaintiff wrote the defendant a letter setting forth that portion of defendant's order of suitings which plaintiff would be unable to fill because of its inability to secure piece goods from the mills. That a copy of said letter is attached hereto and made a part hereof, marked "Ex. 3."

Deponent further says that when and as the manufacture of merchandise under said order and supplementary order was completed, and from time to time the merchandise so manufactured was delivered by the plaintiff f. o. b. cars, Rochester, New York, billed to the defendant at Tulsa, Oklahoma; that deliveries to defendant by the plaintiff under said order began on or about the 21st day of July, 1920, and continued to and until about the 3rd day of November, 1920, when plaintiff had fully performed its said contract.

Deponent further says that on or about the 1st day of August, 1920, prices in the clothing market and of woolens began to fall and that general financial conditions began to show depression.

That on or about the 20th day of August, 1920, the plaintiff began to have returned to it merchandise so delivered to the
41 defendant on said order and contract without any reason being assigned therefor; that not knowing the reason for such return, plaintiff caused the cases containing said merchandise to be reopened and an examination of such merchandise to be made with the greatest care; but being unable to find any fault therein or therewith, the plaintiff did, on the 20th day of August, 1920, write

the defendant a letter, a copy of which is annexed hereto and made a part hereof, marked "4". And again, on August 24th, having received no communication from the defendant relative to the return of said merchandise, the plaintiff wrote a letter to defendant which was signed by this deponent in behalf of the plaintiff, a copy of which is annexed hereto and made a part hereof, marked "Ex. 5".

That in the due course of the mails and on or about September 7th, 1920, the plaintiff received from the defendant a letter under date of September 4th, 1920, which is attached hereto and made a part hereof, marked "Ex. 6". That thereupon, under date of September 7th, 1920, the plaintiff telegraphed the defendant, a copy of which telegram is annexed hereto and made a part hereof, marked "Ex. 7". On September 14th the plaintiff wrote the defendant a letter, a copy of which is annexed hereto and made a part hereof, marked "Ex. 8". And again on September 21st, 1920, the plaintiff wrote the defendant a letter, a copy of which is annexed hereto and made a part hereof, marked "Ex. 9". In the due course of the mails and on or about October 4th, 1920, the plaintiff received a communication from the defendant, a copy of which is annexed hereto and made a part hereof, marked "Ex. 10", and, upon the same day, the plaintiff wrote the defendant a letter, a copy of which is annexed hereto and made a part hereof, marked "Ex. 11". That on October 9th, 1920, the plaintiff telegraphed Curtis Brown, the president of the defendant, a copy of which telegram is annexed hereto and made a part hereof, marked "Ex. 12". On or about October
42 27th, 1920, the plaintiff received from the defendant a letter under date of October 20th, 1920, a copy of which is annexed hereto and made a part hereof, marked "Ex. 13", and on the said 27th day of October, 1920, the plaintiff sent the defendant a telegram, and a letter confirming the same, a copy of which letter is hereto annexed and made a part hereof, marked "Ex. 14".

Deponent further says that of the total of 524 garments which the plaintiff manufactured for the defendant at Rochester, New York, and delivered to the defendant at Rochester, New York, in accordance with the contract made and existing by and between the plaintiff and defendant, and revised and confirmed by the defendant at Rochester, New York, on the said 23rd day of June, 1920, as hereinbefore set forth, the defendant did take and accept 48 garments of the aggregate price of $2,560.40, and did arbitrarily reject and return to plaintiff 476 garments of the aggregate agreed price of $25,320.10, for no reason whatsoever beyond that it, the defendant, had contracted and agreed to pay too high a price therefor.

That the plaintiff has fully and duly performed all of the terms and conditions of the said contract on its part to be done and performed, and that the said defendant has not only neglected and refused to accept delivery of the said 476 garments, but has also refused and neglected to pay any part of the amount agreed to be paid by it to the plaintiff upon account of said contract, although the full amount thereof is now long past due and payable.

This action is brought by the plaintiff against the defendant to recover damages for the breach of the contract hereinbefore described.

EDWARD ROSENBERG.

Subscribed and sworn to before me, this 4th day of February, 1921.

GLENN L. BUCK,
Notary Public.

43 Ex. 1.

Curtis Brown Company,
Tulsa, Okla.

GENTLEMEN:

The reference swatches of your Fall order are going forward, and it is important for you to know at this time to what extent our delivery service can go.

It is the desire of Fashion Park to have you understand that a delivery of order seventy-five per cent of your Fall purchases cannot be assured. A revision of order made by you without being familiar with the conditions will work out to your decided disadvantage, and have the effect of throwing your entire order out of balance. With the facts before us we can proportion the necessary reduction in the way to serve your interest best.

We hope to improve the service of the past season, but this can be done only by your continued co-operation, and if we receive deliveries from the Mills, in large enough quantities to take advantage of our increased production layout.

Fall goods now have the right-of-way thru the shops.

Very truly yours,

FASHION PARK.

D.C.L./E.L.

44 Ex. "2."

Curtis Brown Co.

A Quality Shop for Men.

Tulsa, Okla.

May 25, 1920.

Fashion Park,
Rochester, N. Y.

GENTLEMEN:

Kindly furnish us reference swatches of our fall and winter purchases as quickly as possible.

Please advise us when we may expect them.

Yours very truly,
(Signed) CURTIS BROWN CO.,
By C. B.

C. C. B.—M.

45 Ex. 3.

Curtis Brown Company,
Tulsa, Okla.

GENTLEMEN:

It is the desire of Fashion Park to have you know that our enlarged tailor shops warranted our assurance of a seventy-five per cent delivery this Fall.

The closing down of the Woolen Mills disturbed all our plans; and so that you may be informed to what extent non-delivery of piece goods will affect your Fall Order, we have attached hereto a list of doubtful lots for which piece goods have not reached us and, if you will permit, we will be pleased to offer substitutes wherever possible.

Similar information on your Overcoat Order will follow.

FASHION PARK SERVICE DEPARTMENT.

List.

7054,	5 @	45.
7753,	5	60.
8029,	5	68.50.
7066,	6	45.
7065,	5	45.
7053,	6	45.
7053,	5	45.
7055,	5	60.
7810,	4	62.
7413,	5	56.50.
7413,	4	56.50.
7511,	6	60.
7612,	5	60.

46 Ex. 4.

Rochester, August 20, 1920.

Curtis Brown Co.,
Tulsa, Okla.

GENTLEMEN:

We have received several memorandums of the return of merchandise without any lots. In checking up the goods received we find that your memorandum calls for 41 suits and 1 overcoat, and the case contained 37 suits and 5 overcoats.

These garments were thoroughly looked over by Mr. D'Annunzio himself, for inasmuch as you made no comments on the return of these, we thought it possible that we were at fault in fit and tailoring, but Mr. D'Annunzio has explained that there isn't a thing the matter with this lots of goods.

We tried them on and also have compared the fabric with the swatches sent you but find that not a single lot has been substituted. We are therefore at a loss to know why these goods were returned.

We certainly cannot accept the return of merchandise after goods have been cut according to your direction, and goods are being returned to you today.

You know we do not want to be arbitrary and will do as much or a little more for you than for anybody else, but we cannot understand your returning goods without even saying why you do it.

There is an absolute guarantee on everything we ship from Fashion Park. If your customer is not satisfied with his purchase Curtis Brown Co. #2 in every way, we stand ready to make good and you know it.

With best regards, I am

Very truly yours,

DANIEL C. LIPPMANN,
Sales and Publicity.

47 Ex. 5.

Mr. Curtis Brown,
Curtis Brown Co.,
Tulsa, Okla.

Rochester, August 24, 1920.

MY DEAR BROWN:

My attention has been called to two returns of merchandise without any comment. Also to the investigation which has been made showing that the merchandise is up to standard in every way, and that there is no excusable reason for the return of same.

I cannot quite understand the motive in back of all this, for when you were here, your order was gone over thoroly and such changes made as were entirely agreeable to you, and an additional order placed on some special numbers.

Don't you think the courtesy of an explanation might be due us. We have every reason to feel, from the impression you made here, that you are fair, square and above board, and would appreciate it very much if you would let me know just what the trouble is.

We are compelled to return the suits of 7520 which are all right in every way.

With kindest regards.

Very truly yours,

——— ———.

E. R. C.

48 Ex. 6.

September 4, 1920.

Rosenberg Bros. & Co.,
Rochester, New York.

GENTLEMEN:

We have your communication of August 20, and August 24, which was awaiting my arrival after having been away on a vacation for three weeks.

We do not wish you to assume the attitude that we draw from these two letters, that we wish to be arbitrary about returning merchandise. The facts of the matter are very plain and are this: We do not feel that we can sell Fashion Park Clothes at a minimum of $75.00 and up, when the demand is almost unanimously for garments retailing at $65, $60, $70, and $75.

Perhaps you will recall that last Spring there was a great many of your numbers cancelled on the lower end of the line, and this fall practically all of the lower end numbers were cancelled owing, as you said, to your inability of the mills to deliver the fabric. This of course was quite a disappointment to us. We can sell a few high price suits, but they are not in the majority.

The shipments that you have made us are coming in by piecemeal. We have them now ready to go back to you. We are sending all of these high priced garments back with this explanation, which we trust will be very satisfactory. We cannot sell high grade garments exclusively. Every store in this town is featuring clothes, at $55 and $60. Naturally there will be some better clothes sold, but not exclusively high price clothes.

I expect to come east next week. I will either stop in Rochester going or coming. We would be very glad indeed if you would accept this shipment of higher priced garments. To keep them would mean a loss to us as we positively can not sell suits ranging at a minimum of $75.00 up.

Knowing that you have a very high class clientele throughout the country, and the demand for your finer tailored garments, we believe you can readily dispose of these garments, and we trust our action in returning them will meet with your approval.

Thanking you, and with kindest regards,

Yours very truly,

(Signed) CURTIS BROWN.

49 Ex. 7.

Dated Sept. 7, 1920.

To

Curtis Brown Co.,
Tulsa, Okla.

You cannot return goods to us as stated in your letter of September fourth. We are wiring to save expense.

FASHION PARK.

50 Ex. 8.

Sept. 14th, 1920.

Mr. Curtis Brown,
Tulsa, Okla.

DEAR SIR:

We are reshipping twenty-eight garments which we received to-day.

These garments have been gone over carefully and found to be up to our standard in every particular, and are being returned to you as per the Night Letter sent by Mr. Edward Rosenberg on September 10th.

Very truly yours,

FASHION PARK,
DANIEL C. LIPPMANN,
Sales & Publicity.

51 Ex. 9.

Sept. 21st, 1920.

MY DEAR CURTIS:
Tulsa, Okla.

MY DEAR CURTIS:

Received a notice to-day from the express company that shipment had been refused which had been returned to you.

Now, Curtis, there is no use of taking this attitude. If we have to go the limit on seeing the justice of our cause carried out we are willing to do it, but why force such an issue?

You want to play fair we know, so please see that the merchandise in question is taken out of the express office.

Very sincerely,

M. ——— ———,
President.

52 Ex. 10.

Sept. 29, 1920.

Rosenberg Bros. & Co.,
Fashion Park,
Rochester, N. Y.

GENTLEMEN:

After being absent from here since Sept. 6th I have all of your recent communications, including your telegram, upon my return.

I believe I stated in a former letter my intention to stop in Rochester and discuss personally with you our apparent difference. Your night letter of Sept. 10th was relayed to me in New York; this is the wire in which you say, "any time I happen to be in Rochester you would go over the situation with me". Since you did not invite an interview, I did not deem it necessary to solicit you the second time. I want to say now that our interests are mutual—very much so. You need us in this town, just as much as we need you.

My position is outlined in a previous letter, and we positively cannot sell clothes listing at the minimum prices of $75.00 and up. We do not believe any store, anywhere, could do so. After our order was revised at the factory you deliberately cancelled all of our low-end numbers, leaving us nothing to sell at less than $75.00. We are not dreaming as you infer, we do not want to force any issue, nor resort to any court, but we have Lawyers out here in Oklahoma who

make a living at such attempts to handle cases like this, just as they do in Rochester.

Play fair?—that — our policy and our platform, we ask only fairness from our business associates. Last Spring you cancelled our low end numbers, now you repeat it this Fall. Perhaps the mills did not deliver low end numbers to you. We bought them from you and we had to have suits to sell at less then $75.00—you have not supplied them. Every man cannot afford to pay an average price of $88.00 for clothes this Fall, such as the remaining average of your invoices after all our lower price garments were eliminated from our order by you.

Markets are breaking very fast, we have the situation pretty well in hand. On next Saturday we inaugurate what we intend to be one of the greatest sales this concern ever held. We are through with high prices, we believe the public is tired of them. We are getting out "from under", if you want to work hand in hand with us there isn't a concern in the country that will meet you as fair and as far as we will.

We want your co-operation and will await your answer with interest.

Sincerely,

CURTIS BROWN CO.,
(Signed) CURTIS BROWN.

C. B./C. F.

53 Ex. 11.

Oct. 4, 1920.

Mr. Curtis Brown,
c/o Curtis Brown Company,
Tulsa, Okla.

My Dear Brown:

I can't quite understand your letter of September 29th wherein you say that our night letter of September tenth was relayed to you in New York and when you received a telegram from us, in answer to one of yours, wherein I state that any time you happen to be in Rochester we would go over the situation with you, you sidestepped the issue by assuming that we did not want to talk to you and passed the matter over.

You know mighty well that you did not need any different invitation than that. Simply meant, and should not have been misunderstood, that any time you came to Rochester we would be glad to go over the matter with you. Surely, when you were in New York, if you had wanted very keenly to go over this thing with me, you would have stopped off in Rochester.

Now, I am going to refer to your next paragraph where you say "Play fair." We certainly are going to play fair and I think you are going to play fair, and I know that you did not study your order when you wrote your letter as you did.

You have an idea that we have cancelled all your cheap clothing

and are just filling the order on your higher priced merchandise. You seem to forget all about the fact that you were in Rochester, went over the situation thoroughly with me, got our viewpoint on the matter, and left here in perfect accord.

We know the situation as well as you do. We know that it is a very bitter pill for any concern to take its medicine, but unless we misjudge our man very much, you are not a squeeler. .....

You have an opinion, from the way your letters

—2—

read and from your action, that we are pushing the loss on to you, due to the fact that you are not getting the cheaper end of our merchandise, only getting the higher end, in view of which I herewith list to you what has been cancelled from your order:

32	suits	$45.00
6	.....	48.50
9	.....	56.50
26	.....	60.00
4	.....	62.00
5	.....	68.50

54 and you received 109 suits specially priced.

On your overcoats we cancelled

4	@	47.50
5	.....	50.00
7	.....	73.50
11	.....	52.50
12	.....	61.00
17	.....	62.00
5	.....	63.00
17	.....	72.00
3	.....	100.00

This does not look as though we had taken any advantage of you.

Now, Brown, I don't want to go back and rehearse what we tried and were successful in doing for you when you first started in the clothing business, but I do want to look ahead with you. You are going to be successful in Tulsa. There is no question about it. Both of us could get along very nicely without each other in Tulsa, but how far more sensible it is for both of us to get along with each other and have Fashion Park, as time goes on, do things for you which will help make you further successful.

Expect you to take in the merchandise that is laying in the express office, same as we wired you, and the balance of your order. Our records show how we played the game with you. Now if you don't want to play it this way, clean and straight, we feel that we will be far better off, in the future, without the Curtis B. account and we are not any more anxious to lose a customer than you are to lose one.

We want your business. We want to do all

—3—

that is within reason for you. At the same time, when a situation arises like it did this season in the merchandise world, we certainly expect you to do your part.

Very truly yours,

——— ———,
President, Fashion Park.

E. R.*A. M.

55 Ex. 12.

Night Letter.

Rochester, N. Y., 9/10/20.

To Curtis Brown
Street and No. —
Place, Tulsa, Okla.

You and I went over your order carefully when you were here. Some special things were done for you. Every effort made to please. You certainly cannot even dream we would accept the return of merchandise made. Are reshipping same to you today. Look forward to acceptance. Any time you are in Rochester I shall be glad to go over the entire situation with you but for us to accept return of merchandise that has been cut for you and reconfirmed personally by you at factory is out of the question.

EDWARD ROSENBERG.

56 Ex. 13.

October 20, 1920.

Rosenberg Bros. & Co.
Rochester, N. Y.

GENTLEMEN:

We have your telegram of October 4, in which you advise us to take in the suits and overcoats that has accumulated here in the express office, and your letter of the same date.

According to your statement you cancelled 82 suits at an average price of $53.54 each and 81 overcoats at an average price of $63.67 each.

This includes, as you know, part of the cancellation as we agreed upon when I was in the factory in June, the balance representing your cancellation in September, of 47 suits averaging $47.65, and 20 overcoats averaging $50.88 which represents practically all of our low end numbers originally purchased.

According to our records we accepted from you, previous to your voluntary notice of cancellation in September after the acceptance by both you and us of the revised order in June, 189 suits and 62 overcoats valued at cost, $10,154.00 and $3,410.00 at cost respectively.

Since your notice of cancellation of our low end numbers, we have refused from you 329 suits valued at cost, $17,162.00 and 68 overcoats valued at cost, $4,063.00. This merchandise is now in the hands of the Express Company.

It would be business suicide for us to accept and attempt to sell these suits and overcoats at our normal profit, which would compel us to mark these suits at an average price of $78.00 and the overcoats at an average price of $90.00. Our sales records show for the past two weeks that we are selling suits at an average price of $52.25 and overcoats at an average price of $41.30, and these prices are based on mighty slim profit margins.

You no doubt know that here and in fact throughout the entire country the people are demanding lower priced clothing and that the clothing industry as well as the retailer is bending every effort to supply it.

Rosenberg Bros—#2

This much is certain, we cannot pay more for our merchandise than we are able to sell it for and remain in business. We positively cannot accept these high priced suits and overcoats and allow you to cancel all the low priced garments. We believe if you have the right to cancel all the cheaper suits and overcoats that we have the same right to cancel all the high priced garments.

If we accept that part of our order which you offer, we are paying an average of $1.29 more per suit than our records show we sell them at, and on overcoats we would be paying $19.70 per garment more than our average selling price.

Of course we could get mad and tell you to go to hell and eventually we could get into the courts and after prolonged prosecutions and a year or two of appeals one of us would have to pay anyway, and by the time the case was settled, the clothing in question, would be moth eaten, out of style, and practically worthless.

57 We believe there is a better way to settle it whereby we can each benefit each other and thus be of mutual assistance when it is most needed.

In view of the present depression in business, lower prices, and still lower demands on the part of the buying public, I am going to suggest that you allow us 33 1/3% off the invoice price, before October 30, 1920, regular terms, on all the suits and overcoats now in the express office, and we in turn will sell them at first net cost, which means a loss to us of the cost of doing business, and try to dispose of them as best we can. We are not making this offer with the expectation that you will come back with a compromise of 20%, 25% or 30%. In times like these, drastic cuts and drastic actions are necessary to get business and we believe you will agree with us. Quick action is necessary as these suits and overcoats are deteriorating in value every day.

Every high grade known make of clothing is sold by competition in this town and regardless of high quality, low prices at this time is the only incentive that will induce the public to buy.

We hope you fully appreciate our position and that you will be willing to cooperate with us to this extent, on the basis as herein outlined.

Very truly yours,

CURTIS BROWN COMPANY.

(Signed) CURTIS BROWN.

C. C. B.: L. C.

58 Ex. 14.

October 27, 1920.

Curtis-Brown Company,
Tulsa, Oklahoma.

GENTLEMEN:

We hereby confirm the day letter which we have just sent you as follows:

"We shall hold you responsible for all damages resulting to us by reason of your non-acceptance of the merchandise purchased by you from us. We shall dispose of all merchandise ordered by you from us and rejected by you and returned to us at the best possible price and credit the same to your account holding you responsible for the balance of the purchase price.

Yours very respectfully,
ROSENBERG BROS. & COMPANY, INC.,
By —— ——.

59 Supreme Court, Monroe County.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

STATE OF NEW YORK,
County of Monroe,
City of Rochester, ss:

A. Ivan Brickner, being duly sworn, deposes and says: I reside at No. 55 West 95th Street, in the City of New York, and now am and have been at all the times hereinafter mentioned in the employ of and connected with the plaintiff in the above entitled action.

In the discharge of my duties to the plaintiff I now have charge of plaintiff's sales to customers in the States of Virginia and Texas, and in the City of New York, and until the year 1919 to its customers in the State of Oklahoma; and in conjunction with Mr. Joseph Rice I have charge of plaintiff's sales rooms and office located in the building known as 200 Fifth Avenue in New York City.

I know Curtis C. Brown, the President of the defendant. I first met him at Tulsa, Oklahoma, in October of 1917, when we had

some discussion relative to his becoming a customer of the plaintiff. At my suggestion he met me at the home office of the
60 plaintiff in Rochester on the 3rd day of January, 1918, where, in company with me, he made arrangements with Mr. Maurice Strauss, the treasurer of the plaintiff, to take on the plaintiff's kine of clothing commencing in the Fall season of 1918.

At this time a line of credit was fixed and terms of payment for the goods to be purchased were agreed upon. All goods purchased from Rosenberg Bros. & Company were to be purchased on sample subsequently to be manufactured at the Rochester factory and delivered to the defendant f. o. b. Rochester.

At this time defendant's company or corporation was known as the Brown & Blazer Clothing Company.

In April of 1918 I visited the said Brown & Blazer Clothing Company at Tulsa, Oklahoma, and Mr. Curtis C. Brown selected from the samples which I then displayed to him merchandise in accordance with the arrangements which he had made with the plaintiff at Rochester on the 3rd day of January, 1918, which goods were subsequently manufactured and delivered to the said Brown & Blazer Clothing Company in accordance with the terms of the contract so made.

In the Fall of 1918 I again sold to the said Brown & Blazer Clothing Company its requirements for plaintiff's line of clothing for the Spring of 1919.

At this time Mr. Curtis C. Brown told me that he had purchased all of the stock of Mr. Blazer in the Brown & Blazer Clothing Company and that the business would be conducted in the future in the name of Curtis Brown Company. He also told me that he then owned substantially all of the stock of the Curtis Brown Company.

Commencing January 1st, 1919, Bentley Thomas was placed in charge of plaintiff's sales to customers in the State of Okla-
61 homa, and thereafter I did not have personal contact with defendant's selection of merchandise from plaintiff's line.

During all the time of my acquaintance with Mr. Curtis C. Brown I personally know that he has visited New York State to purchase not only from plaintiff but other lines of merchandise as well for the Brown & Blazer Clothing Company and its successor, the Curtis Brown Company, at least two or more times each year.

From my first meeting with Mr. Brown I had taken a very deep interest in him and in his welfare. When I first met him he was attempting to do a large business upon a very small capital. I considered him a very able man and was instrumental in inducing the plaintiff to extend credit to him at a time when it was not warranted. For that reason, I was very anxious that he should succeed, and was correspondingly pleased that he did succeed. Mr. Brown, whenever he was in New York, visited me at the plaintiff's office 200 Fifth Avenue and discussed with me his business and general business, and he has visited me at least twice a year or more, in New York City.

Between June 21st and 29th, 1920, Mr. Brown visited me at the office of the plaintiff in New York City. At that time he told me

that he had just come from Rochester, where he had revised his Fall order with Mr. Edward Rosenberg.

On January 3, 1921, Mr. Joseph L. Rice being absent from the City of New York and I being at plaintiff's sales offices, 200 Fifth Avenue, was in charge thereof. At about ten o'clock in the morning, while I was engaged in other work, our telephone operator advised me that Mr. Curtis Brown desired to see me. I went out to meet him and after we had greeted each other I took him into one of our private offices. After exchanging the ordinary civilities, Mr. Brown asked me, "Brick, do you know that the line was taken away from me and given to Renberg's?" and I said "Are you sure of it?"

and he said "Yes; they sold him some fall heavy weights as
62 a close out proposition and have sold them their spring bill."

He said, "I am mighty sorry they did do it without even giving me due advice that they contemplated changing the account." I told him that I did not know. At about this time Mr. Watson came in and served the summons in this action. Mr. Brown then said, "This is the last thing in the world I expected from Rosenberg's. I am not running away from a law suit. If they had told me they wanted to sue me and to serve me with papers I would have come to Rochester to be served. I had contemplated stopping off at Rochester on my way here to see Rosenbergh's but I had so much business to do here that I did not have time."

A. IVAN BRICKNER.

Sworn to before me this 21st day of January, 1921.
SARAH W. NEUMAN,
Notary Public.

63 [Endorsed:] Supreme Court, Monroe County. Cir. 2023. Rosenberg Bros. & Company, Inc., Plff., vs. Curtis Brown Company, Deft. (Copy). Answering Affidavits and Order to show cause why service of Summons should not be set aside. Werner & Harris, Attorneys for Plaintiff, 618 to 621 Insurance Building, Rochester, N. Y. Filed Apr. 26, 1921. Harris S. Williams, clerk.

64 At a special term of the Supreme Court Held at the courthouse in the city of Rochester in and for the county of Monroe, N. Y., on the 5th day of February, 1921

Present: Hon. A. J. Rodenbeck, Justice.

Supreme Court, Monroe County.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

Upon reading and filing the affidavits of George H. Harris and Maurice Strauss, each verified on the 2nd day of February, 1921,

submitted in behalf of said motion, and after hearing Mr. George H. Harris of counsel for plaintiff in behalf of said motion, and Mr. Jacob H. Corn, of counsel for the defendant opposed, and due deliberation having been had thereon,

Now upon motion of Werner & Harris, attorneys for the plaintiff herein, it is hereby

Ordered, that said motion be and hereby is granted, and that Dodge L. Marks, Esq., attorney and counsellor of this Court, having offices on the twenty-first floor of the Equitable Building in
65 the City, County and State of New York, be and he hereby is appointed Referee herein to take the depositions of E. W. Bill, J. G. Whitehall, St. Clair Burns, R. A. Holmes, William Lask, A. L. Eicholtz, John P. Ahrens and Miss Donnelly.

Dated February 5th, 1921.

JAMES L. HOTCHKISS,
Clerk.

Enter:

A. J. RODENBECK,
J. S. C.

Filed Feb. 5, 1921, Monroe County Clerk's Office.

66 [Endorsed:] Supreme Court, Monroe County. (Copy.) Rosenberg Bros. & Company, Inc., Plff., against Curtis Brown Company, Deft. Order Appointing Referee. Werner & Harris, Attorneys for Plaintiff, 618 to 621 Insurance Building, Rochester, N. Y.

67 Supreme Court Monroe County.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

Depositions of Edward W. Bill, James G. Whitelaw, St. Clair Burns, Robert A. Holmes, Louis Lask, Miss Helen M. Donovan, John P. Ahrens and Abraham L. Richold, taken before Dodge L. Marks, Attorney and Counsellor at Law, Room 2133, *Equitable Building,* 120 *Broadway, City, County and State of New York, February* 11, 1921, *pursuant to order of Honorable A. J. Rodenbeck, made herein February* 5, 1921.

Appearances:

Messrs. Werner & Harris, by George H. Harris, for the plaintiff.

Messrs. Siegel & Corn, by Jacob H. Corn, appearing herein specially for the purpose of moving to vacate the service of the summons.

68 E. W. BILL, being duly sworn by the Referee, testifies as follows:

Direct examination.

By Mr. Harris:

Q. What is your full name?
A. Edward W. Bill.
Q. Mr. Bill, you reside where?
A. Hotel Majestic.
Q. In New York City?
A. Yes.
Q. Your position is what?
A. Imported men's hats.
Q. You are a member of what firm?
A. Bill & Caldwell.
Q. What is that, a copartnership or a corporation?
A. A firm; I am the only member.
Q. A firm of which you are the only member?
A. Yes, sir.
Q. That firm does business at what place?
A. 743 and 745 Broadway, New York City.
Q. And how long have you been engaged in business there?
A. Thirty-four years the 15th day of last November.
Q. Do you know the Curtis Brown Company of Tulsa, Oklahoma?
A. Yes. We have done business with them.
Q. And for how long?
A. Well, I don't know——
Q. Well, approximately?
A. Well, I don't know; I can't answer that.
Q. You did business with them more than the year 1920 and since?
A. Oh, yes.
Q. Do you know Curtis Brown the president of the Company?
A. Yes.
Q. Was there a time when you saw him here in January?
A. Well, I think it was January; I am not familiar with that; I think it was January.

69 Q. Can't you fix the date?
A. No, I can't fix the *the* date. No. I may be able to tell from a memorandum I have here.
Q. Will you produce it?

(Witness complies.)

Mr. Corn: I want to make an objection at this point. I want to inquire whether a subpœna duces tecum has been issued in this case?
Mr. Harris: It has.
Mr. Corn: Now, Mr. Referee, having considered the question thus far, I think under Section 885, under which this proceeding has been taken, neither the Referee nor counsel have a right to issue a subpœna to compel any person, especially one not a party to the

action, to produce books or papers, and a subpœna duces tecum in special form, directing the parties to produce books and papers should not be issued. I would like to inquire, if I may, who signed this subpœna?

Referee: You are appearing as counsel for whom? As counsel for the defendant?

Mr. Corn: Yes sir.

Mr. Harris: The subpœna was issued, as we believe, in the regular form, signed by the County Clerk of the County of Monroe and signed by Judge Rodenbeck.

Mr. Corn: Well that's a different thing; I didn't know that. But I wish to make the objection that the subpœna is invalid, as
70 an order for the issuance of a subpœna should be incorporated in the order appointing the Referee. Could we have the subpœna produced here and marked for identification?

Mr. Harris: Well, my suggestion upon that point is this: That the only persons who can raise that question are the people who are subpœnaed.

Referee: I suggest that any question that you desire to raise as to the procedure be noted upon the record for submission to the Court upon the return of the depositions.

Q. You have refreshed your recollection from a paper produced by yourself?

A. What's that?

Q. As to the time when you saw Mr. Brown here?

A. Yes, I have. About the 4th of January.

Q. Where did you see him at that time?

A. I saw him at my place of business.

Q. Of Bill & Caldwell?

A. Yes, sir.

Q. And do you recollect about what time?

A. Well, as near as I can remember it was the forepart of the afternoon. I am not familiar with the exact time.

Q. Will you go on and state, as nearly as you can, what was said by him and by yourself after he entered your place?

A. Well, Mr. Brown came in principally to inquire about one of our salesmen that had travelled through that territory for a great many years who had been ill and was unable to make a certain trip, and talked about sales and conditions in general. And made
71 the remark that he was not on a buying trip. He was simply making the trip more for pleasure than business.

Q. I want you to tell exactly what took place.

A. Well, we had on hand a certain amount of cancelled goods made up with the retailers' names in which we were selling cheap, and I naturally said to him, "We've got something here that perhaps don't interest you at this time of the year, but why don't you take the stuff and dispose of the merchandise at a low figure?" He said, "I am not interested in buying merchandise but will be on two or three weeks later to buy spring goods." But in the meantime he bought them because of their being offered at such a low figure.

Mr. Corn: I move to strike out the words "he bought" and not let the witness give his conclusion that it was then and there a purchase, or whatever it was.

Q. To cover that, I will ask you to state what he said about purchasing the goods.

A. Well, he ordered these goods on the strength of the price, but remarked, "I am not buying my spring hats but I could have a sale and sell these hats and probably it would be a good thing to ship them out to me.

Q. You showed him the merchandise at your place of business?

A. Yes, sir.

Q. And an order was written out?

A. An order was made out.

Q. Who did the showing?

A. I did the showing.

72 Q. And the order was filled out as you went along and the selection made?

A. The selections were made and the order was put down in the regular way.

Q. Have you a copy of that order with you?

A. Yes, sir.

Q. Will you produce it, please?

(Order exhibited.)

Q. Does the paper which you produce contain the order which was given at that time?

A. Yes, sir.

Q. The three order sheets on the bill-head of Bill & Caldwell, numbered 1944, 1945 and 1946, are the orders to which you refer.

A. Yes.

Mr. Harris: I offer them in evidence and ask that they be marked A-1, A-2 and A-3.

Mr. Corn: Now, Mr. Referee, I object to these three sheets 1944, 1945 and 1946.

Mr. Harris: Can't you interpose this later, as per the agreement?

Mr. Corn: I know of no agreement.

Mr. Harris: It was suggested before that all objections should be taken up later.

Mr. Corn: No, I can't agree to that.

Mr. Harris: Well, all right.

Mr. Corn: I object to the introduction of these three sheets, 1944-45 and 46 on the ground that they are not binding on the defendant, and in support I ask leave to cross-examine the witness.

73 Mr. Harris: You have a perfect right to cross-examine later.

Mr. Corn: I am asking now to cross-examine as to these three sheets; I am not asking for a cross-examination now.

Referee: I have your objection on the record, and I suggest that your objections be taken up in the appointed way later.

Mr. Corn: I want to show that the papers are incompetent as

against the Curtis Brown Company, and if you offer them in evidence I would like to have a ruling on that, because there will probably be other papers offered and I would like to know where they stand. Now, if the Referee is going to rule that he is going to take everything that's offered whether it appears to him to be relevant to the inquiry or not, then I want to have an opportunity to apply to the Court to limit the scope of the examination. The Court has those powers. And I don't want to, by my silence here, allow things to come in here which might prejudice Curtis Brown Company and still not make objection to it. Mr. Referee, do you overrule my objection?

Referee: I decline to rule on the question. I haven't the authority unless the parties consent that I do it.

Mr. Harris: I object.

74 Mr. Corn: Well, all right; that's a ruling in itself.

Q. At that time, Mr. Bill, was anything said between you and Curtis Brown as to the time when the goods which had been selected were to be shipped?

A. Yes; if I can remember, they were to be shipped at once.

Q. All of them?

A. All that we had on hand.

Q. Was there any talk as to whether they should be shipped some by express and some by freight?

A. I don't remember.

Q. You don't recollect?

A. No.

Q. Mr. Bill, how many sheets were made out at the same time of Exhibits A-1, A-2 and A-3?

A. How many order sheets?

Q. Yes.

A. The order appears there; I don't——

Mr. Corn: You mean duplicates?

A. Oh, duplicates. One duplicate and one original. This is the original and the duplicates are the same.

Q. Was that done on that day?

A. It had to be done on that day because the order was taken on the order book.

Q. What was done with the duplicate?

A. I suppose we have it.

Q. Was any duplicate given to Mr. Brown?

A. I don't know. I don't remember. I don't think so. There might have been, at that.

75 Q. You were the one who made out the paper?

A. No. That was Mr. Whitelaw's assistant, William Teller.

Q. Was there a time when you sent to see Mr. Whitelaw?

A. Yes, we all talked there together when he was in.

Q. But you showed him the goods, and he made the first selection of the goods with you?

A. I did.

Q. Will you kindly examine the Exhibits A-1, A-2 and A-3 and tell us if those were the goods which he actually selected on that day.

(Witness examines Exhibits).

A. They are the goods he selected.

Q. Now, what talk, if any, was had between you and Mr. Whitelaw and Mr. Brown that you recollect on that day?

A. Nothing, except what was said when he came in, about business conditions throughout the country and the outlook and his inquiries regarding Mr. Hazelton, the salesman who was sick.

Q. Did you hear any talk between Mr. Whitelaw and Mr. Brown about any account of Bill & Caldwell's against the Curtis Brown Company?

A. No; there was no conversation that I heard of that kind.

Q. Did you give directions to the person who made out these sheets, Exhibits A-1, A-2 and A-3, in the presence of Mr. Brown?

A. How's that again?

Q. Did you give any instructions to any person in respect to making out sheets Exhibits A-1, A-2 and A 3 in the presence of Mr. Brown?

A. I don't think so.

76 Mr. Corn: At this point, for the purpose of preserving my rights, I move to strike off of the record Exhibits A-1, A-2 and A-3, upon the ground that it now appears from the testimony of this witness that those sheets were not written out in the presence of Curtis Brown. When they were offered in evidence before, it was certainly—or at least on my part—it was under the impression that these order sheets, so-called, were made out in the presence of Mr. Brown. Now it appears that these sheets were not made out in the presence of Mr. Brown, and the witness has already testified that he did not give Mr. Brown a copy that he did not give Mr. Brown a copy of those sheets; Mr. Brown did not take away a copy of those sheets, and therefore, those sheets are now incompetent to the issues raised by the motion.

Referee: Your objection to that extent is noted on the record as heretofore.

Mr. Corn: I see.

Q. Mr. Bill, attached to Exhibits A-1 and A-2 is a sheet (which I ask to have marked for identification, Exhibit A-4); this sheet is on the letterhead, or billhead, of Curtis Brown Company, Tulsa Oklahoma. Do you know what that sheet is?

A. Well, that's a confirmation blank—I should call it.

77 Q. Do you know when that came into the possession of the firm of Bill & Caldwell?

A. I couldn't tell the exact date. I think it came in within a day or two.

Q. Within a day or two after January 4th?

A. Well, I wouldn't swear to that. I think I opened the mail and it came in within a day or two after Mr. Brown was in.

Q. It came in after he was in?

A. Yes; it came in after.
Q. And to your best recollection, a day or two after?
A. Yes.

Mr. Harris: I ask that the paper attached to Exhibit A-3 be marked "Exhibit A-5."

Q. Now, the paper Exhibit A-5, attached to the back of Exhibit A-3, is what?
A. That was the straw hat order.
Q. What is your best recollection as to when that came to Bill & Caldwell?
A. At the same time as the others, as well as I can remember.

Mr. Harris: Now I offer all of these papers in evidence and ask that copies thereof be attached to the deposition.

Q. At that time, Mr. Bill, was there any other conversation that you recollect?
A. I don't remember any conversation except what I have repeated here.
Q. I think that's all.

78 Cross-examination.

By Mr. Corn:

Q. Mr. Bill, for how many years are you acquainted with Curtis Brown?
A. Well, that's hard for me to state. I have not come in contact with Mr. Brown as much as Mr. Whitelaw has, but I should imagine about a couple of years to the best of my remembrance.
Q. And on some occasions when he came into your place of business you say his contact with Mr. Whitelaw and others was more frequent than with you personally?
A. Yes.
Q. Now, you say he came in on the 4th of January, to the best of your recollection?
A. Yes.
Q. That is, of 1921?
A. Yes.
Q. And your best recollection is that this was in the afternoon.
A. Yes.
Q. You did not have any previous appointment with him, did you?
A. No.
Q. You did not know he was coming?
A. No, sir.
Q. Had you been informed by any person he was coming?
A. No, sir.
Q. And when he got there, do you know whether he spoke first with you of those who were in the place at the time?
A. If my remembrance serves me correctly, he spoke first to Mr. Whitelaw.

Q. That is to say, he first talked with Mr. Whitelaw in a conversation in which you took no part and was not present, and then talked with you?

A. Yes.

79 Q. In what part of the premises did this conversation with you start?

A. In our salesroom.

Q. Have you a Mr. Hazelton in your employ?

A. We have.

Q. And is Mr. Hazelton a salesman?

A. He is.

Q. Wasn't Mr. Hazelton the salesman who previously sold goods to the Curtis Brown Company for your concern?

A. He has been selling the Curtis Brown Company, and, as far as I know I think he opened the account, but I couldn't swear to that.

Q. Is Mr. Hazelton a travelling salesman?

A. Yes.

Q. Now, didn't Mr. Brown, when he spoke to you, ask about Mr. Hazelton?

A. He talked about Mr. Hazelton to Mr. Whitelaw, and I don't remember in the conversation he had with me—yes, I know he talked about Mr. Hazelton.

Q. Didn't you say on direct examination that he inquired about sales when he first came in?

A. Yes.

Q. And isn't it a fact that Mr. Hazelton was here at that time?

A. As I stated Mr. Hazelton had been ill and didn't make the trip and he is not here at this time.

Q. During his conversation when he first came in he inquired about Mr. Hazelton. That came up during his conversation.

A. Exactly.

Q. Now, how long a time was he in your place before you showed him any goods?

A. Well, I should say ten or fifteen minutes, at a guess.

Q. Didn't run into hours, did it?

A. No. Just a little while.

80 Q. And you had a conversation about business conditions in general?

A. Yes, sir.

Q. And who first referred to the subject of looking at the goods—was it Mr. Brown or you?

A. It was me.

Q. In what way did you open the conversation concerning showing him the goods?

A. Well, when we have goods what I call to "give away," we say we have a "gold mine" for a customer.

Q. And do I understand you opened up the conversation concerning his looking at the goods by intimating in words, and with the eloquence of the salesman, that there was a "gold mine" to be looked at?

A. It might be put that way.

Q. At any rate, you started the conversation about showing the goods?

A. I certainly did.

Q. Now, what did he say to you when you started to talk about showing him the goods?

A. He stated that he was not on a buying trip; that he would be on a few weeks later to buy his spring goods.

Q. Did he state to you at that time for what purpose he had come to New York?

A. Well, he stated, as nearly as I can make out, that he was on a pleasure trip.

Q. Well, at any rate he did say to you that he was not on a buying trip?

A. He certainly did.

Q. Notwithstanding, you, having goods to dispose of, continued to talk sales?

A. I did.

Q. And you showed him what?

—. I showed him merchandise we were selling at fifty cents on the dollar. These were made up with the retailers' names in
81 and such merchandise is very hard to dispose of except at a sale, and I intimated that this would make good merchandise for a sale.

Q. Did you tell him that you had merchandise that you were willing to sell at fifty cents on the dollar?

A. I think I did.

Q. And that interested him?

—. It seemed to.

Q. And what did you show him?

A. I showed him Borsalino soft hats.

Q. Is that a straw hat?

A. No; that's an Italian make of soft hat.

Q. Did you show him original stock or a sample?

A. I showed him the goods that were made up with the retailers' names in.

Q. You showed him Borsalino hats which had already been prepared for other retailers and the name of the retailer was printed in the hat and that was why they were being sold cheap?

A. That's it.

Q. In other words, they were returned merchandise?

A. Returned or cancelled.

Q. And after showing him this merchandise he said he would take some of them, did he?

A. The order indicates that he took them.

(Mr. Corn examines exhibits.)

Q. Now, sheet No. 1944, or Exhibit A-1: These were soft hats, were they not?

A. Yes.

Q. And those were selected by him?

A. Yes.

Q. Then sheet 1945, Exhibit A-2, were the Borsalino hats, were they not?

A. Yes.

82 Q. Now, in whose handwriting are sheets 1944 and 1945?

A. Mr. William Teller's.

Q. Mr. William Teller is a person in your employ?

A. Yes.

Q. Is he an assistant to you?

A. An assistant to Mr. Whitelaw.

Q. What position does Mr. Whitelaw have in your place of business?

A. He is my manager.

Q. I now show you plaintiff's Exhibit A-5 and I ask you if that is an order for straw hats?

A. It is.

Q. How many?

A. Nine dozen.

Q. In whose handwriting is plaintiff's Exhibit A-5?

A. Well, I suppose that's Mr. Brown's.

Mr. Corn: Pardon me, I am running ahead.

Q. I show you now sheet 1946, Exhibit A-3. That is the order for straw hats, is it not?

A. Yes.

Q. In whose handwriting is that?

A. That's Mr. Teller's.

Q. Now, then, there is no handwriting of Mr. Brown's on Exhibit A-3 anywhere, is there, so far as you know?

A. No.

Q. And there is no handwriting of Mr. Brown on Exhibits A-1 or A-2 so far as you know?

A. No.

Q. Now, did Mr. Brown, at the time he was in your place of business on January 4th, sign or deliver to you any confirmation of order.

A. Not that day.

Q. Isn't it a fact that he told you, after making these selections, if he ordered them he would order them right away?

A. No, sir.

Q. Didn't he tell you he was going to think it over and if he wanted the goods he would send you a confirmation?

83 A. No, sir.

Q. Is your recollection perfectly clear on that point?

A. It certainly is.

Q. What did he say?

A. Why, what was there for him to say? He bought the goods and the order was left to be shipped at once.

Q. He didn't give you a confirmation at that time, did he?

A. No, he did not.

Q. Was anything said about sending him the confirmation later?

A. I don't remember him saying anything about it.

Q. Do you know how many days after January 4th the two con-

firmations, plaintiff's Exhibit A-5 and Exhibit A-4 for identification, came in?

A. Well, as I testified, I don't know exactly, but at a guess I would say one or two days after.

Q. And they did come in the mail, did they?

A. They came by mail.

Q. How long would you say that Mr. Brown was in your place of business altogether?

A. Well I can't tell—an hour, I would say.

Q. When you were taking this order Mr. Whitelaw was in the place of business all the time, wasn't he?

A. Yes.

Q. Do you know how much goods Curtis Brown Company bought from your concern last spring?

A. I can't tell you that without looking it up.

Q. What was the total amount of the order for straw hats? I withdraw that.

84 Q. On this straw hat order there were three dozen orders of each? In other words, in the column headed, "No. Items, 3,—Men's—Dozen", the price refers to the price per dozen.

A. That's it.

Q. So then, there were three dozen at $30, or $90, for that item; and three dozen at $24—or is it six dozen at $24?

A. That's "3" there.

Q. The total amount of that order then is $234, isn't it?

A. If you figured it up right it is.

Q. That shows all the items of the straw hat order, at any rate?

A. Sure.

Q. Now in the order for the felt hats—soft hats, rather—in Exhibit A-4, being the confirmation, again in the column headed "Items", the figures show the number of dozens.

A. Yes.

Q. And over here, it shows the price per dozen?

A. Yes.

Q. And that represents the total of the order, whatever that arithmetically amounts to?

A. Yes.

Q. All right. *Q.* You stated that he said in the course of the conversation that he would be in within two or three weeks to buy spring goods?

A. That's right.

Q. You remember clearly that he said that?

A. He certainly did.

Q. Now, you didn't show him any merchandise other than that mentioned on those two orders?

A. Well I might have shown him some others but he didn't buy anything other than what is on those two orders.

85 Q. Well, you couldn't swear to it, could you?

A. Pretty hard thing to swear to. A man usually shows everything he's got to sell.

Q. You are entirely fair and impartial between the parties, are you not?

A. Absolutely.

Q. He used the words to you when you wanted to show him goods that he was "not interested but would be in two or three weeks later to buy spring goods? Didn't he say that?

A. He did.

Q. Well, now, isn't it a fact that the spring buying begins toward the latter part of January rather than around New Year's?

A. I don't think there is any spring buying now; nowadays they buy very little.

Q. Now, let me ask you: These straw hats are goods for summer wear?

A. They are.

Q. And the soft hats are goods for spring wear, aren't they?

A. Spring or immediate use.

Q. And the buying for spring is done in the late fall?

A. We sell our goods for spring commencing about—as near as I can judge—about the middle of September usually, or the first of October.

Q. You say you buy your goods?

A. No; we sell them. We take orders. Our men go on the road from the 15th of September until October.

Q. Do you know whether the Curtis Brown Company bought goods last fall for spring?

A. I couldn't tell you that.

Q. Your records would show that?

A. They would.

86 Q. Who would be the man most familiar with that in your place of business?

A. Mr. Whitelaw.

EDWARD W. BILL.

Sworn to before me this 19th day of February, 1921.

DODGE L. MARKS,
Referee.

Notary Public, Kings County, No. 195.
Kings Co. Register's No. 1019.
New York Co. Clerk's No. 19.
New York Co. Register's No. 1171.
Commission expires March 30, 1921.

87 JAMES G. WHITELAW, being duly sworn by the Referee, testifies as follows:

Direct examination by Mr. Harris:

Q. Your full name, Mr. Whitelaw?

A. James G. Whitelaw.

Q. Mr. Whitelaw, where do you reside?

A. In Maplewood, New Jersey.

Q. And what is your business?

A. I am manager for the firm of Bill & Caldwell, importers of hats, 743-745 Broadway, New York.

Q. And how long have you been in that line?

A. I have been in that line for thirty years.

Q. And you were with Bill & Caldwell in January, 1921?

A. I was.

Q. Do you know Curtis Brown Company, of Tulsa, Oklahoma.

A. I do.

Q. Your firm had done business with them for how long, approximately?

A. Possibly three years. We also had business associations with the Brown, Blazer Company, the predecessor of Curtis Brown Company.

Q. Do you know Curtis Brown, the president of that Company?

A. Yes.

Q. How long have you known him?

A. Possibly two years.

Q. Wasn't there a time when you saw him in New York City in January?

A. Yes.

Q. Where did you see him?

A. In our place of business, 743 Broadway, New York City.

88 Q. On what day?

A. January 4th.

Q. Do you recollect what time of day?

A. Not exactly. It was in the afternoon.

Q. Will you go on and state what he said on that day, what he did and what you said?

A. Mr. Brown came in and I was the first to greet him. He asked me questions about how I was and so on, and then said "How is Hazelton", referring to our Mr. Hazelton who had been ill, and we talked about Mr. Hazelton. About that time Mr. Bill came into the group and we had some conversation about Mr. Hazelton and his not being quite well, and then the conversation drifted into a talk about general business conditions, Mr. Brown mentioning that he was just on to see how things were and was on more or less of a pleasure trip, or words to that effect. Mr. Mill and I talked about conditions among retailers and deplored certain practices and conditions in regard to our trade, all of which Mr. Brown agreed to. The conversation along those general lines possibly lasted fifteen or twenty minutes, or perhaps it may have been a half hour. Mr. Bill then, naturally, as one would do, asked Mr. Brown if he didn't want to buy something and Mr. Brown said that he was not buying; that he would be on in a couple of weeks to buy. We had just finished inventorying and had marked certain merchandise at a very ridiculous price, and Mr. Bill had that in mind, I presume, so, in spite of Mr. Brown's attitude, he showed the merchandise to Mr. Brown and suggested to Mr. Brown that, quite apart from his spring purchase here were some goods which he could buy and

89 turn into money at a special sale; and, as a result of Mr. Bill's eloquence, Mr. Brown bought certain merchandise.

These felt hats, which have been previously referred to as bought by Mr. Brown, together with three items of straw hats, had come from a certain factory in which we were interested—in fact Mr. Bill had made a deal with this factory so that we could offer merchandise for the time being very, very cheap, and Mr. Brown, on account of the particularly inviting proposition put before him on the straw hats, bought three lots of straw hats, as well as the felt hats referred to. At that time—that is, early in January—our office force had been busy for probably a week or ten days, working often late in an effort to acquaint our trade with certain concessions which we were making in straw hats,—I refer to orders which had already been placed,—and I believe I asked Mr. Brown if he had been quoted the new price on straw hats yet and he said he had not. So I showed him. I think I either showed him the order showing the price or a copy of a letter of mine which had been written. There was a little conversation for about five minutes on that subject. I am not sure that Mr. Bill was present then. But Mr. Bill and I were with Mr. Brown practically all the time that he was in our place of business, and aside from what I have outlined, there was nothing talked over, no business done, and no conversation had to the best of my recollection.

Q. You have given now what occurs to you as having happened at that time.

A. Yes, sir; and in the sequence in which it happened.

Q. Now at that time, were Exhibits A-1, A-2 and A-3 prepared?

A. Yes, Mr. Harris.

90 Q. Now, will you state the circumstances under which those papers were filled out?

A. Mr. Bill, Mr. Brown, Mr. Teller and myself were in the sample room. Mr. Bill is not accustomed to selling merchandise, as it is not naturally his job as he is the chief and other men are hired to do it, but he is interested in Mr. Brown and he *siad* "Teller, come in and see what Mr. Brown wants." That introduced Mr. Teller into the group, and either at Mr. Bill's dictation or with Mr. Brown's approval—as to that I don't know—but at all events, these various notations as to the numbers desired of each lot, were put down by Mr. Teller.

Q. And you were there when that was done?

A. Practically all the time.

Q. And Mr. Brown was there?

A. Mr. Brown was there, yes.

Q. How were those sheets made out, in duplicate or triplicate?

A. Presumably in duplicate. This sheet is bound in a book with another sheet attached to it, and between those it is our custom to put a carbon sheet so that when writing off a copy simultaneously another copy is written. I think no triplicate was made.

Q. What was done with the other duplicate.

A. I have no definite knowledge. It is our custom to give a duplicate to the man who buys the goods, but I don't recollect that.

Q. Do you know how the person who made out Exhibits A-4 and A-5 derived the necessary information?

A. I presume it must have been through a duplicate. I don't recollect that Mr. Brown put down on any memorandum book the purchase as he went along. I don't recall that he did.

91 Q. Did you see him have any paper in his hand similar to Exhibits A-4 and A-5?

A. No, he had nothing of that kind with him.

Q. Did you see anything of a paper he had in his hand at that time?

A. I can't answer that question; I don't think so, but as to the presence or absence I made no note.

Q. Do you know, or have you any means of fixing the time when Exhibits A-4 and A-5 came into the possession of Bill & Caldwell?

A. I have no knowledge. My recollection is it came in two or three days later than Mr. Brown's visit—not immediately thereafter but two or three days later.

Q. What was said about shipment of the goods described on Exhibits A-1, A-2 and A-3?

A. I believe Mr. Bill emphasized the fact that these goods could be used by Mr. Brown for immediate sale most advantageously, and Brown agreed.

Q. It is marked on the paper "at once"?

A. That does not necessarily infer that Mr. Brown said ship "at once". Of course, the inference, as a matter of fact, was such.

Q. When was the merchandise described in Exhibit A-1, A-2 and A-3 shipped?

A. It was shipped January 5th, January 19th and January 20th.

Q. Now, what of it was shipped January 5th?

A. All the items on sheet A-3; all the items on sheet A-2 and all except three items on sheet A-1.

Q. How was it shipped?

A. All shipments were made by express.

Q. Those on January 5th by express?

A. Yes.

92 Q. Have you the shipping receipts there?

A. I have.

Q. By what Company was that?

A. American Railroad express.

Mr. Harris: I offer the three express receipts in evidence and ask that they be marked Exhibits B-1, B-2 and B-3, and the shipping tickets attached thereto, and ask that they be marked Exhibits B-4, B-5 and B-6.

Mr. Whitelaw: I want to correct something I said. I mentioned that the goods in question were all sent by express. However, I find that part of the shipment of January 5th, that is to say, the nine dozen straw hats, were included with six dozen straw hats of a previous order, which has not been the subject of testimony at this time, and the total of fifteen dozen straw hats were sent on January 5th by the New York Central Freight in three cases.

Mr. Harris: I offer the receipt and ticket in evidence and ask that it be marked B-7 and B-8.

Mr. Corn: Those are simply documents going to show that the goods were shipped?

Mr. Harris: Yes. They are nothing but that.

Q. Now you have referred to a paper of a previous order. Have you that here with you?

A. Yes.

Q. And is this the paper?

A. That's it.

Mr. Harris: I ask that this be marked Exhibit A-7.

Mr. Corn: That is, you offer it in evidence?

Mr. Harris: I ask that it be marked that.

Mr. Corn: For evidence or identification?

Mr. Harris: For identification.

Q. On this day that Mr. Brown was in your place, on January 4th, was this paper referred to?

93 A. That is the order which I referred to in the testimony and on which I told Mr. Brown that we were to give him some concession on the price.

Q. And did you produce the order at that time?

A. I am not sure whether I produced it or showed him a copy of a letter that I had written relative to the matter, but the matter was discussed.

Q. I notice that on this particular paper Exhibit A-7, under the head of "Price", the entries made in black ink or black pencil have lines drawn through them and part of them are entered in figures in red ink. When was that done?

A. That particular marking might have been done probably the latter part of the year, between Christmas and New Year's.

Q. And was this paper, Exhibit A-7, brought in on that day and the changes under the heading of "Price" called to Mr. Brown's attention at that time?

A. Well, Mr. Harris, I can't recall that. The matter was discussed, but whether I actually showed him this order or showed him a copy of a letter, which was similar to letters written to all of our trade bearing on the subject, I don't recall.

Q. Have you the letter here?

A. Yes; I think so. Our stenographers were busy on the very large job of writing a great many letters to all of our trade, and it is possible we had not yet reached Mr. Brown's order.

Q. That is your best recollection?

A. In view of that fact, yes. In view of the absence of the copy.

Q. What did he say upon this subject?

A. The subject was introduced by me, Mr. Harris. I know it was something which was very much in my mind because it had

94 been a very large job, and I said to Mr. Brown, "Did you get a letter regarding changes in price of straw hats on the old order," and that, I think, was the way the subject was introduced, and Mr. Brown, as I recall it now, was shown the order with the changed price.

Q. Did he express any assent to it at that time?
A. I think he expressed himself as being pleased.

Mr. Harris: I ask that this be offered in evidence as Exhibit A-7.
Mr. Corn: I object to it as immaterial.
Q. At that time was anything said about your last year's account with the Curtis Brown Company?
A. No.
Q. On January 4th was there not something said by you to Mr. Brown about the fact that there was an invoice overdue?
A. No, there was not. The nearest conversation along that line was the question of a shortage of a dozen straw hats on a shipment in April, 1920, and as to this I must qualify the statement. I am not sure that on January 4th I spoke to Mr. Brown, I know recently I asked him about the question of the shortage of $75 and asked him if he had made any progress with the matter of collecting from the express company, but aside from that there was nothing said about the account.
Q. Wasn't there something that occurred between you and Mr. Brown?
A. No.
Q. Between the firm and Mr. Brown?
A. Yes.
Q. State what that was.
A. A few days previous to January 4th we had a remittance from Mr. Brown, and our cashier referred it to me and said that there had been ten per cent taken off the remittance and he was en-
95 titled to six. I had been away in Europe for about seven weeks before Christmas and I was not exactly conversant with everything that had happened, so I asked Mr. Bill, "Do you know why Brown should take ten per cent off this remittance?" and he said "No". Then Mr. Brown came in on January 4th.
Q. No reference was made to his account in any way?
A. About an hour after he left I said to Mr. Bill, "I was asleep. I should have asked Brown about that excess discount"; and Mr. Bill said, "Perhaps if you get him on the 'phone you can get a better explanation than by writing." I couldn't get him on the 'phone because he was stopping at a hotel and I couldn't locate him. I mention this because I didn't ask him the very thing I should have asked him.
Q. Have you seen Mr. Brown since January 4th?
A. He was in our office either the latter part of last week or early this week.

Mr. Corn: I object to that upon this ground: That our motion to vacate is based upon the fact that when he was here in the early part of January he was not here on the business of the Company but that the primary purpose of the trip was a pleasure trip, and that this depends upon the facts as they occurred on that trip; and a subsequent visit of Mr. Brown to New York at a date after the service of the summons is immaterial. That's my objection.
Referee: Note the objection.

Q. Have you received any communications from the Curtis Brown Company since the 4th day of January?

96 Mr. Corn: I object to that upon the ground that it is entirely immaterial to the issues raised by this motion.

Referee: Answer subject to the ruling on the objection.

A. We have, yes.

Q. Will you kindly produce them?

A. The first I recollect are the confirmations of orders which have been already mentioned.

Mr. Harris: Which are exhibits A-4 and 5. We also received a letter dated January 18th which explained why he took off that ten per cent.

(Paper produced.)

Mr. Harris: I offer this in evidence and ask that it be marked Exhibit B-8.

We also received a letter dated January 7th enclosing remittance and also remittance blank.

Mr. Harris: Marked for identification Exhibits B-8 and B-9.

Q. Are those the only communications you received from the Curtis Brown Company?

A. Yes.

Q. Did you receive any communications from Curtis Brown individually since January 4th?

A. Do you mean by telephone?

Q. No, I mean in writing.

A. No; none at all.

Cross-examination.

By Mr. Corn:

Q. Mr. Whitelaw, this was January 4th that Mr. Brown was in your office?

A. Yes.

97 Q. Had he informed you previously that he was coming?

A. He had not.

Q. Did you have any knowledge that he was coming?

A. None whatever.

Q. About what time, to the best of your recollection, was it that he called at your place?

A. Well, in the afternoon; other than that I can't say. It was not late.

Q. I understood you to say you were the first to greet him?

A. Yes.

Q. And he asked about a salesman by the name of Hazelton, did he?

A. Yes.

Q. Now Mr. Hazelton had been ill, hadn't he?

A. Yes.

Q. Mr. Hazelton was your salesman who visited the Curtis Brown Company on his trips West, wasn't he?

A. Yes.

Q. And Mr. Brown and Mr. Hazelton were acquainted with one another in that way?

A. Yes.

Q. Now, didn't Mr. Brown tell you in the course of the conversation that he had come here on a pleasure trip?

A. Yes, he said he was not on a business trip.

Q. Didn't he say he was not here for the purpose of buying goods?

A. He didn't use that language.

Q. Did you hear the testimony of Mr. Bill that was given this morning?

A. Yes.

Q. Did you hear Mr. Bill testify that Brown stated he was not buying goods this trip?

A. Well, I can't say that he used these words, but undoubtedly, and unqualifiedly, he gave that impression. I have no recollection as to what words he used, but his language would give the idea that he was not buying goods this trip.

98 Q. He didn't ask you to show him goods, did he?

A. No.

Q. And in your hearing, he asked no one else to show him goods?

A. Not at all.

Q. His first inquiry was concerning Mr. Hazelton, wasn't it?

A. Yes.

Q. What did he say? Give me his words if you can recall them.

A. He came in and after the first greetings were over we had a general conversation, and he said, "How is Hazelton getting along?" And we talked about Hazelton and Mr. Brown referred to the length of time he had known him, etc. I told Mr. Brown that I thought Mr. Hazelton would be on the road very soon, and we had a general conversation along that line—prolonged a great deal longer than it takes me to tell you, naturally.

Q. I imagine so. For how long has the Curtis Brown Company been a customer of Bill & Caldwell?

A. Well since they started up; we also sold to their predecessor, the Brown, Blazer Company. I have known the name for three or four years.

Q. How long have you known Curtis Brown?

A. I can't answer exactly how long.

Q. Well, its a fact that Mr. Curtis Brown was in the Brown, Blazer Company, isn't it?

A. If you ask me that unqualifiedly, I always thought he was.

Q. Well, don't you remember your concern sold goods to the Brown, Blazer Company through Curtis Brown, and then later?

A. The concern bought goods of Bill & Caldwell. But I don't want to give you the impression that I have known him a long time.

I think my acquaintance with Curtis Brown began since he has been in business under his own name.

99 Q. When you say "in business under his own name" you are referring to what is known as the Curtis Brown Company?

A. Yes.

Q. And that covers two years, at least?

A. That's it. That is my recollection.

Q. Now, these straw hats are hats for summer wear, aren't they?

A. Yes.

Q. And the soft hats are for spring wear?

A. Nominally, they are.

Q. When is the regular buying period for goods to be used for spring wear?

A. For straw hats the buying period starts July 1st of the year previous to the year in which they are worn; for felt hats the buying period starts about October 1st.

Q. Can you tell me whether the Curtis Brown Company purchased goods for spring wear in the fall of 1920? The firm purchased a certain bill of his of straw hats in July, 1920. *Q.* How big was that order?

Mr. Harris: It is the one in evidence.

Mr. Corn: I wanted to get to the amount of the order—$953.75.

Q. Now, between the date of that order, which you say was in July, 1920, and the order of January 4, 1921, did the Curtis Brown Company buy any other goods of your Company—that is, of Bill & Caldwell?

A. They did.

Q. Give me the dates of the orders and the amounts.

A. In order to make this matter clear, in the first instance the order placed July 9, 1920, for $553 was an order given for straw hats to Mr. Sternecker, one of our salesmen who visited Tulsa during Mr. Hazelton's illness. The next transaction with the Curtis Brown Company was on October 7th, when Mr. Hazelton

100 visited Tulsa, having in the meantime sufficiently recovered to make a short trip, and on October 7th when Mr. Hazelton visited Tulsa, the Curtis Brown Company gave him an order for three dozen Borsalino hats.

Q. Could you give me the order in dollars and cents?

A. The amount as corrected, because there was a certain concession made in the price, was $252.

Q. Now the next order?

A. There is no other order.

Q. I see. When did Mr. Hazelton's illness commence? I mean that, of course, in the sense of when he stopped work.

A. I think probably in May, 1920, if I remember rightly.

Q. And then he didn't work until October, or at least he didn't get out to Tulsa until October 7th when he took this order which amounted to $252?

A. That's right.

Q. Did he stop working again after October 7th?

A. Well, only in the respect that he did not work as energetically nor cover his territory as fully.

Q. He didn't visit Tulsa after October 7th?

A. I have no knowledge that he did.

Q. And when Brown came in he asked whether Mr. Hazelton had recovered from his illness?

A. There was a conversation along that line.

Q. Hazelton was not there that day was he?

A. No.

Q. Isn't it a fact, as Mr. Bill says, that in the course of the conversation about Mr. Hazelton and about general business conditions, Mr. Bill approached him concerning these Borsalina hats on hand?

A. Certainly.

Q. And were these Borsalino hats he spoke of hats that had been returned by other customers?

101 A. Some returned and some cancelled which had never been shipped.

Q. And they had the name of the customer printed in?

A. In the lining or on the leather, either or both.

Q. And because they were returned merchandise and in that condition, they were offered at a very low price?

A. Yes; that was the reason the concession was made.

Q. And that was stated to Mr. Brown in the course of the conversation, wasn't it?

A. Very strongly emphasized.

Q. Now on these two previous orders which Brown gave you—one on July 9th and one on October 7th—were these returned or cancelled merchandise or were they regular merchandise?

A. They were our regular merchandise.

Q. Didn't Brown say to Mr. Bill when he first began to talk about this order, that he had not come on this trip to buy goods at all, or something to that effect?

A. He absolutely did.

Q. What was the regular price of these Borsalino hats? That is, what was the price without their being cancelled merchandise?

A. $84 to $90 a dozen.

Q. And what was the price on this order?

A. $45.

Q. In other words, they were split in half, just as Mr. Bill says.

A. Yes. Sold at fifty cents on the dollar.

Q. Now, before I ask you about the papers, I want to ask you, at the same time didn't Mr. Bill solicit Mr. Brown to give him an order for straw hats?

A. Why, evidently he got an order for nine dozen at that moment. Yes.

Q. Now, these straw hats that were ordered at that time: Were they reduced price or regular.

A. They were not regular goods in any sense; they were

102 a certain purchase that the firm of Bill & Caldwell had made most advantageously because of the fact that Mr. Bill, through his kindly interest in a certain firm had advanced a certain amount

of money to, and because of Mr. Bill's practically financing that concern we were able to buy merchandise at riduculous prices for the moment, and it was because of this that Mr. Bill was able to interest Mr. Brown in spite of his very evident determination not to buy any goods. I think I must honestly say that Mr. Brown would not have bought straw hats at regular prices that day.

Q. He didn't, at any time, ask you or Mr. Bill to show him any merchandise?

A. No.

Q. He didn't tell you he came in to buy merchandise?

A. He did not.

Q. How long was he there?

A. He might have been there an hour or an hour and a half.

Q. Now, isn't it a fact that this transaction of buying Borsalino hats and straw hats only occupied a short time.

A. Well, Mr. Brown reaches decisions quickly. In actually selecting the mechandise and making up his mind, he probably was not more than fifteen minutes at that time.

Q. Isn't the early part of January the time that people coming in would have long conversations about business conditions rather than the busy time?

A. Yes.

Q. And isn't it a fact, to put a fair construction on the whole interview, that this business of buying Borsalino hats and straw hats came up, so to speak, incidentally through Mr. Bill starting a conversation about it.

A. Yes.

103 Mr. Harris: I interpose an objection that this is purely a conjecture and calling for the operation of the witness's mind.

Referee: Something to that effect is on the record now. It's covering the ground twice.

Mr. Corn: All right, if it's the way you look at it.

Q. Now, isn't it a fact, Mr. Brown signed absolutely nothing that day?

A. He signed nothing so far as we are concerned.

Q. And the confirmation of orders that have been offered in evidence—I don't remember the numbers.

Mr. Harris: Exhibits A-4 and A-5, which are on the blanks of Curtis Brown Company, were not delivered by Brown to you that day?

A. They were not.

Q. What is your best recollection as to the manner in which those confirmation of orders reached your firm?

A. They were put on my desk by Mr. Bill. I infer they came through the mail. That was done two days or longer after Mr. Brown's visit.

Q. In speaking of the reduction in price of merchandise pre-

viously ordered by the Curtis Brown Company, you have reference to the order of October 7th, haven't you?

A. No. The principal conversation was in relation to the order of July 9th.

Q. I beg your pardon. That was my mistake. You stated on direct examination that something was said at this interview with Curtis Brown on January 4th concerning a reduction of price
104 of a previous order. What order were you referring to?

A. I was referring to the order given to Mr. Sternecker on July 9th.

Q. Now, was this reduction made by your concern voluntarily?

A. Yes.

Q. Was the reduction made to all, or practically all of your customers who had bought this class of merchandise?

A. Every single customer.

Q. Had you sent notice of this fact out to the Curtis Brown Company by mail.

A. I think not. I fail to find the copy.

Q. You were asked something about when these red ink items were made on Exhibit 7?

A. They were made by Mr. Thomas, my assistant, who went over them to figure out what concessions were to be given to the customers, and my best recollection is that it was the last of the year—sometime after Christmas probably. It does not infer that we immediately wrote to every customer. As I have stated, the office force was very busy, and the Curtis Brown letter was not written previous to his visit, and to obviate the writing of the letter I infer that when I talked with him, in the absence of a letter, I explained the matter in person so as to obviate the writing of the customary letter.

Q. You informed Brown, however, at this interview, that the reduction had been made, did you not?

A. Yes.

Q. Did you start the conversation on the subject or did he?

A. No he did not. I started it.

Q. You volunteered that information, did you?

A. Yes.

105 Q. A man named Morris Strauss, said to be connected with Rosenberg Bros. & Company, of Rochester, New York, has made an affidavit in this case in which he states that you informed him, Strauss, that you told Curtis C. Brown on January 4th that an invoice aggregating $1,026, and more than thirty days past due and owing by Curtis Brown Company to Bill & Caldwell had not been paid, to which Brown replied that it must have been overlooked and directed that a duplicate invoice thereof be mailed to the defendant, Curtis Brown & Company, at Tulsa, Oklahoma. I want to ask you, first, did you at any time during that interview on January 4th, have any such conversation with Curtis Brown.

A. I have no recollection whatever.

Q. Did you ever tell Morris Strauss that you had such a conversation with Curtis Brown?

A. No; naturally not. I might make a statement, if it is permissible?

Mr. Harris: Very well. Make it.

A. The firm of Fashion Park telephoned me and some representative asked if we were doing business with Curtis Brown. I said "Yes." They wanted the usual credit information, and I encouraged whoever was speaking to come down and see us, because it is not customary to give credit information over the telephone. A certain young man (whose name I do not recall at this moment) came in to our office, and at that time I told him just how the Curtis Brown account was; that a certain bill had not been paid, etc. That is the only conversation which I had with anyone regarding the account. The bill in question was $1,032.

106 By Mr. Harris:

Q. And did you state at that time the circumstances under which invoices had been shipped later and had been received by the purchaser?

A. I did.

Q. And you said that it had been overlooked?

A. I said that.

By Mr. Corn:

Q. Did you say to this young man, whoever he was, that you had told Brown at the interview on January 4th that this invoice was overdue and unpaid?

A. I have no recollection whatever of having told the young man that or of having told Brown anything.

Q. Now this young man that you invited over the telephone to come down and see you asked you concerning credit, did he not?

A. Well, I can't say they used that term. I simply said, "Come down and see us".

Q. The voice simply said, "Do you sell goods to Curtis Brown?"

A. I couldn't quote the words.

Q. Did the voice say over the phone, "I want to know something about the Curtis Brown account?

A. I have no knowledge as to just what phrase he used, but I instantly said to myself, "This man wants to know about the Curtis Brown account". Among other things he wanted to know if Curtis Brown had bought anything, and I said, "Come down and I will tell you everything I know", which is the custom in the trade.

107 Q. Did he tell you he wanted to embody this information in an affidavit?

A. No, he did not.

Q. Did he tell you this information was to be used in Court?

A. No.

Q. Did you tell him you had a conversation with Curtis Brown about an overdue invoice at an interview on January 4th?

A. I did not.

Q. Did he ask you then and there to sign an affidavit?

A. He did not.
Q. Well, he swears in his statement——
A. Who do you means by "he"?
Q. A man named Morris Strauss.
A. Mr. Strauss is not the man I refer to. The man I am referring to is some man in a New York office who came down for the usual credit information.
Q. Did Morris Strauss call on you on the 25th day of January with an affidavit for you to sign?
A. He called on us but at no time did I see any affidavit.
Q. Well, now, let me read you from his affidavit and tell us whether this took place:

Maurice Strauss swears that "at said time and place (meaning your place of business) on January 25th, he had with him a form of affidavit, and that he then and there requested said E. W. Bill and said J. G. Whitehall (by mistake) to respectively make an affidavit employing the statements that he had made to him."

Q. Did he have any affidavit at that time?
A. I saw no affidavit. He asked Mr. Bill if he could have a statement from Mr. Bill to the effect of the conversation which was had and Mr. Bill said "No; I prefer not to give it"; and Mr. Strauss,
I think, did not pursue the subject further. Mr. Bill said
108 "Of course, if we are subpœnaed we naturally must appear,
but I prefer not to make any signed statement relative to the matter". Mr. Bill used words to that effect. I was there at the time.

Mr. Harris:

Q. You did actually consult your attorney about the matter?
A. I did not.
Q. When Mr. Strauss asked you if you would give him a statement of this matter your answer was deferred for a time, was it not?
A. Yes, for a day.
Q. And on the succeeding day when he was in you were unwilling to make it?
A. Yes.
Q. You advised him that you had given him this information purely for credit purposes; that you wouldn't otherwise have given it, as you were on friendly relations with Curtis Brown Co. and that you wouldn't give any information which might be used against them?
A. Absolutely. I said that Curtis Brown was a friend of ours and while we could not refrain in the first instance to answer what were credit inquiries, further than that we would not go into the matter.
Q. It is a fact that your firm entertains very friendly relations with Curtis Brown Company.
A. Yes. But, Mr. Harris, if that question is to infer that there was anything more than what was open and above disclosure at that time——

Q. You did state that Mr. Bill said in your presence that if you were subpœnaed you would tell the truth?
A. Yes. We would have no objection in the matter, naturally, but we would not voluntarily offer any statement.

109 By Mr. Corn:

Q. And you are entirely impartial in this matter in giving your testimony?
A. Absolutely.
Q. Did you tell Morris Strauss, or anyone, that you would consult your attorney as to whether you would make a statement or give an affidavit?
A. No.
Q. You did consult your attorney on the succeeding day?
A. Mr. Bill and I talked it over at various times.

JAMES G. WHITELAW.

Sworn to before me this 18th day of February, 1921.

DODGE L. MARKS,
Referee.

Notary Public, Kings County, No. 195.
Kings Co. Register's No. 1019.
New York Co. Clerk's No. 19.
New York Co. Register's No. 1171.
Commission expires March 30, 1921.

110 EXHIBIT B-4.

No. of Boxes 27. Date Jan. 5, 1921.

No. 5776.

Name Curtis Brown Co., Tulsa, Okla.:

Shipping Directions: X.
Value: $721.00.
No. of Cases, 2. P. Boxes, 1. Crates, —.

EXHIBIT B 1.

American Railway Express Co.

5776, Original.

Uniform Express Receipt C 694,895.
Non-negotiable. Collect.
Issued at New York, N. Y., Jan. 5, 1921.
Received from Bill & Caldwell.
Address: 743-745 Broadway.
Subject to the Classifications and Tariffs in Effect on Date of Issue.

Article: Two Cases, One P. Box Weight —.
Consigned to Curtis Brown Co., at Tulsa, Okla.
Value herein declared by Shipper to be $721.00.

Which the Company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts and signs this receipt.
985. (3) Three.
(Signed) BILL & CALDWELL,
Shipper.
McCORMACH,
For the Company.

NOTE.—The Company will not pay over $50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

The Company's charge, except upon ordinary live stock, is dependent upon the value of the property, as declared or released by the shipper. If the shipper desires to release the value to
111 $50 for any shipment of 100 pounds or less, or not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, the value may be released by inserting "not exceeding $50", or "not exceeding fifty cents per pound," in which case the company's liability is limited to an amount not exceeding the value so declared or released.

112 EXHIBIT B-5.

No. of boxes, 16. Date, Jan. 19,1921.

No. 6024.

Name Curtis Brown Co., Tulsa, Okla.:

Order #746.

Shipping Directions: Ex.
Value: $96 00/XX.
No. of Cases, 1. P. Boxes, 1. Crates, —.

EXHIBIT B 2.

American Railway Express Co.

6024, Original (5057,5-20).

Uniform Express Receipt D 389171.
Non-negotiable. Collect.
Issued at New York, N. Y., Jan. 19, 1921.
Received from Bill & Caldwell.
Address: 743-745 Broadway.

Subject to the Classifications and Tariffs in Effect on Date of Issue.
Article: One Case, one P. Box. Weight, —.
Consigned to Curtis Brown Co., Tulsa, Okla.
Value herein declared by Shipper to be $96.00.....Dollars.

Which the Company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts and signs this receipt.
4131. (2) (two).
(Signed) BILL & CALDWELL,
Shipper.

(Signed) M. MILLS.
J. JAMES,
For the Company.

NOTE.—The Company will not pay over $50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charged for such greater value paid.

113 The Company's charge, except upon ordinary live stock, is dependent upon the value of the property, as declared or released by the shipper. If the shipper desires to release the value to $50 for any shipment of 100 pounds or less, or not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, the value may be released by inserting "not exceeding $50" or "not exceeding fifty cents per pound," in which case the company's liability is limited to an amount not exceeding the value so declared or released.

EXHIBIT B 6.

No. of Boxes 6. Date Jan. 20, 1921.

No. 6033.

Name Curtis Brown Co., Tulsa, Okla.:

Order #746.

Shipping Directions: Ex. (Value, $108 00/XX).
No. of Cases, —. P. Boxes, 1. Crates, —.

EXHIBIT B 3.

American Railway Express Co.

6033, Original.

Uniform Express Receipt D 389175.
Non-negotiable. Collect.
Issued at New York, N. Y., Jan. 20, 1921.

Received from Bill & Caldwell.
Address 743-745 Broadway.
Subject to the Classifications and Tariffs in Effect on Date of Issue.
Article: One P. Box. Weight, —.
Consigned to Curtis Brown Co. at Tulsa, Okla.
Value herein declared by Shipper to be $108.00.

114 Which the Company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts and signs this receipt.
985. (1) One.

(Signed) BILL & CALDWELL,
M. MILLS,
Shipper.
McCORMACK.

NOTE.—The Company will not pay over $50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

The Company's charge, except upon ordinary live stock, is dependent upon the value of the property, as declared or released by the shipper. If the shipper desires to release the value to $50 for any shipment of 100 pounds or less, or not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, the value may be released by inserting "not exceeding $50", or "not exceeding fifty cents per pound," in which case the company's liability is limited to an amount not exceeding the value so declared or released.

115 EXHIBIT B-7.

No. of Boxes 6 & 2 Cases. Dated January 5th, 1921.

#285-1917.

No. 5777.

(In Pencil:) In Loft 1 Package.

Name Curtis Brown Co., Tulsa, Okla.:

Shipping Directions: Frt. N. Y. C.
No. of cases 3 P. Boxes — Crates —

116 EXHIBIT B-8.

349.

Curtis Brown Co.

A Quality Shop for Men.

Tulsa, Oklahoma.

January 18, 1921.

Mr. J. G. Whitelau,
c/o Bill & Caldwell,
743 Broadway,
New York.

DEAR MR. WHITELAU:

Replying to your letters of January 3 and 13th. You will no doubt recall that when I was in your store in August you volunteered to advance the dating on fine velours to September 1st, 1921, on account of the greatly delayed delivery to us. Please note that we anticipated discount only on about one half of the total amount, as we realized you were kind enough to help us, even though it was at your own expense.

Trusting this will clear up the matter and with kind personal regards.

Yours very truly,

CURTIS BROWN COMPANY,
CURTIS BROWN.

10% on 1205 120.50

117 EXHIBIT B-9.

349.

Curtis Brown Co.

A Quality Shop for Men.

216 South Main Street.

Tulsa, Okla.

Date —.

Bill & Caldwell,
743 Broadway,
New York, N. Y.:

Enclosed find check in full payment of invoices as follows:

No. of Boxes 6 & 2 Cases V Date Jan 5th 1921
#285-1917

Name Curtis Brown Co

Tulsa

Okla

No 5777

611

In Lots

Shipping Directions Ft. Ryley Parker

No. of Cases 3 P. Boxes Crates

OF LADING X 87 Company

Shipper's No. 577

Agent's No.

L & CALDWELL

Cents per 100 lbs

If Class A	If Class B	If Class C	If Class D	If Class E	If Class H	If Class	Per Barrel If Class	H Special Per

STATE OF Ohio COUNTY OF

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

Charges Advanced:

Agent,

Per

agent of the carrier issuing same

120

STANDARD FORM STRAIG

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

RECEIVED, subject to the classifications and tariffs in effect on the date
Bill of Lading,

at New York, JAN 5- 1921 191_ From

the property described below, in apparent good order, except as noted (contents and
noted below, which said Company agrees to carry to the usual place of delivery at said
said destination. It is mutually agreed, as to each carrier of all or any of said property
over interested in all or any of said property, that every service to be performed here
contained (including conditions on back hereof) and which are agreed to by the shipper

The Rate of Freight from

IF 1st Class	IF 1st Class	IF 2d Class	IF Rule 25	IF 3d Class	IF Rule 26	IF Rule 28	IF 4th Class	IF 5th Class	IF

CONSIGNED TO Security Brown Co

DESTINATION Tulsa

ROUTE M P & G

No. Packages	DESCRIPTION OF ARTICLES AND SPECIAL MARKS
	Cases
	Rolls
	Bales

THE CONDITION OF THIS BILL OF LA
AMENDED BY SUPP
CLASSIFICATION No
OR SUBSEQUENT
THE INTERSTATE
STATE COMMERCE
STATE THEY AR
WHICH THEY
ABBREVIATE

9 TO CO
WE TO
DELIVER
WASHINGTON PLACE
Telephone 4997 Spring
BROADWAY

Made by PHILIP HANES PRINTING Co. N. Y.

BILL & BALDWELL, Shipp

Per

(This Bill of Lading is to be signed by the shipp

) ROOMS EUROPEAN PLAN
ES $1.50 PER DAY AND UPWARD
HANDSOME BILLIARD
AND
POOL PARLORS

Hotel Tulsa

W. N. ROBINSON.
OWNER

INNATI STS
Oklahoma July 9/20

. would not sign
ms proration fully
d make up the
tem and has
elling them.
ake up order
Let him know.
Truly
P. J. Steinmeker

121

EXCELL
GOOD
PURCHA

THIRD A
TI

D & C

Gentleman

Mr. Bro
order. I explained
He said if you
hats he will speak
no intention of ca
If you cannot
want to you to pha

D-

See our letter

7-10-20

Department Hats

Labels

Checked against invoice by

WE RESERVE THE RIGHT TO REFUSE OR RETURN AT ANY TIME ALL OR ANY PART OF ANY SHIPMENT MADE TO US AFTER THE SPECIFIED SHIPPING DATE ON THIS ORDER. NO ORDER IS VALID UNLESS SIGNED BY THE SALESMAN AND BUYER.

Ordered of Hill & Caldwell

Address

DIRECTIONS FOR INVOICE—Separate bill required for each dep

Number	Description		No.	A	B
			Items 23	30	31
				6¾	6¾
				8	8¾
8629	Seal		2		
8629	Black		2		
8041	Carib		4		
Do	Black		3		
Do	Beige		1		
Do	Lizard		1		
8045	Cocoa		1		
Do	Cinnamon		1		
7767	Vetaeno	Carolina	1		
88337	Vanessa	Do	1		
7887	Virginia	Do	7/12		
Do	Cokea	Do	11/12		
Do	Mota	Do	1		
11299	Black	Do	1		
17317	Virginia	Do	1		
17317	Vitalka	Do	1		
7887	Piccaine	Do	1		
8097	Cokea	Do	1		

Please send Label

Salesman's Sig

Buyer's Signa

Terms 6/10 60 Extra Date Jan 4-21

No. of Order 746

irtis Brown Co.

TULSA, OKLA.

ANY UNSHIPPED PORTION OF THIS ORDER, IS AUTOMATICALLY CANCELLED ONE DAY AFTER SPECIFIED SHIPMENT DATE. WE RESERVE THE RIGHT TO COUNTERMAND THIS ORDER IN CASE OF FIRE, EARTHQUAKE OR ANY OTHER CASUALTY AFFECTING OUR PREMISES.

43 Broadway City NY How ship Express When Jan 6

ent. Enter Dep't and Order No. on each Invoice. A guarantee must be attached to all invoices, covering Child Labor Act. Or Cancel

Block to follow

D	13½	14	14½	15	15½	16	16½	17	17½	18	Price	Amount	Retail
33	34	35	36	37	38	39	40	42	44	46			
6½	7	7½	7½	7½	7½								
9½	10	10½	11	11½	12								
											24.00		
											24.00		
											36.00		
											36.00		
											36.00		
											36.00		
											46.50		
											46.50		
											45.00		
											45.00		
											45.00		
											45.00		
											45.00		
											45.00		
											45.00		
											45.00		
											45.00		

Signature Curtis Brown

nature

123

Department Straw Hats **Labels**

Checked against invoice by

WE RESERVE THE RIGHT TO REFUSE OR RETURN AT ANY TIME ALL OR ANY PART OF ANY SHIPMENT MADE TO US AFTER THE SPECIFIED SHIPPING DATE ON THIS ORDER. NO ORDER IS VALID UNLESS SIGNED BY THE SALESMAN AND BUYER.

Ordered of Hill & Caldwell **Address**

DIRECTIONS FOR INVOICE—*Separate bill required for each depart*

Number	Description	No. Items	A 30 6½ 8	B 31 6¾ 8½	C 3 6
55	Jennet	3		1 Box	
118	Sterling Die	3			
119	Do	3			

Salesman's S

Buyer's Sig

Terms June

urtis Brown Co.

TULSA, OKLA.

113 Broadway City

ment. Enter Dep't and Order No. on each Invoice. A guarantee must

	D	13½	14	14½	15	15½	16	16½
	33	34	35	36	37	38	39	40
	6¾	7	7¼	7½	7¾	7⅞		
	9¾	10	10¼	11	11¼	12		

1 doz 3 Dr 13-

Signature Curtis Brown

1st 6/10 5/30 Date Jan 4-21

No. of Order 747

ANY UNSHIPPED PORTION OF THIS ORDER, IS AUTOMATICALLY CANCELLED ONE DAY AFTER SPECIFIED SHIPMENT DATE. WE RESERVE THE RIGHT TO COUNTERMAND THIS ORDER IN CASE OF FIRE, EARTHQUAKE OR ANY OTHER CASUALTY AFFECTING OUR PREMISES.

Ruff How ship Express When Jan/21

must be attached to all invoices, covering Child Labor Act.

16½	17	17½	18	Price	Amount	Retail
40	42	44	46			
				30 00		
				24 00		
				24 00		

124

1920

June 17	Invoice	1,032.00
	6% Disct.	61.92
		$970.08

1/31

118

EXHIBIT B-9.

Curtis Brown Co.

A Quality Shop for Men.

Tulsa, Oklahoma.

January 27, 1921.

Bill & Caldwell,
743 Broadway,
New York, N. Y.

GENTLEMEN:

With reference to your letter of January 21st. We are surprised to hear that you have not received our check to cover your invoice of June 17th, 1920.

Upon reviewing our records we find that our check No. 1411 to the amount of $970.08 went forward to you on October 23, 1920, and we are at a loss to understand why you have never received it.

We are enclosing our check No. 1782 as a duplicate of No. 1411 and if in the meantime you receive the first check issued, kindly return it at your earliest convenience.

Thanking you for calling this to our attention, we remain,
Yours very truly,

CURTIS BROWN CO.,
P. L. SISK.

L 1032
6192

970.08

6/2

(Here follow reproductions of Exhibits B7, D2, A7, A4, A3, A2, and 81, marked pages 119-127, inclusive.)

128 ST. CLAIR BURNS, being duly sworn by the Referee, testifies as follows:

Direct examination.

By Mr. Harris:

Q. Mr. Burns, your full name?
A. St. Clair Burns.
Q. And where do you reside?
—. I am at present stopping at 34 E. 32d Street.
Q. Is that a hotel?
A. Yes.
Q. How long have you been there?
A. Say two months.
Q. You were living there in January, then?
A. Yes.
Q. What is your business?
A. I am a travelling salesman for Crofut & Knapp.
Q. How long have you been working for them?
A. Let me see—I was away from them for two years—Well, I would say about eight or nine years.
Q. And you were in their employ in the month of January, 1921?
A. Yes.
Q. Do you know the Curtis Brown Company of Tulsa, Oklahoma?
A. I do.
Q. And do you know Curtis C. Brown, its president?
A. Yes.
Q. How long have you known Mr. Brown?
A. Well, I would say six years. I am not positive. I knew him under the name of the Brown, Blazer Company.
Q. And he was secretary and treasurer of that concern?
A. I couldn't say.
Q. You know he has purchased goods from your concern?
A. Yes.

129 Q. You have done business with him, he acting for the Curtis Brown Company?
A. Yes.
Q. Did you see him in the month of January, 1921?
A. Yes.
Q. Where?
A. At 251 Fifth Avenue, the New York office of Crofut & Knapp.
Q. And the Crofut & Knapp Company is a corporation organized under the laws of what state?
A. The State of Connecticut. They have salesrooms in New York City at 251 Fifth Avenue.
Q. About what time of day was it?
A. Well, it was in the forenoon. I would say between 11 and 12 o'clock, if I remember rightly.
Mr. Corn: What day was that?
A. I think it was the 5th of January.

By Mr. Harris:

Q. And will you tell what took place from the time you first saw him?

A. Well he came in and I greeted him in the usual manner and when the "How's-your-mother" part was over he said he wanted to see Mr. Holmes about a matter. Mr. Holmes came over from his office across the street and he and Mr. Brown talked, but I did not hear that conversation. After he was through talking with Mr. Holmes, I told Mr. Brown we had some cancelled hats at the factory which I would like to sell him. He asked me the price of the same and I first said $39 a dozen. Then he wanted to know if that included his trademark, and I said "No" but that we would put
130 them in for $3 a dozen, making the price $42 a dozen. So Mr. Brown said "You can select me 10 dozen at $42 a dozen," which I did.

Q. And was that embraced in the form of an order?

A. I wrote the order and sent it to the factory and he sent Crofut & Knapp a confirmation by telegram from Tulsa, Oklahoma, in which he stated "Sixty days and these hats will have to be shipped by—(I am not sure, I think the 8th)—January 8th."

Q. Have you got that telegram?

A. That telegram is at the factory. I have my reply: "Our terms are 30, not 60." So I wired Curtis Brown: "Holding up order as your confirmation says ship January eighth or cancel. Confirmation received January eighth. Had to print die. Terms Six Ten Thirty extra not Sixty. Advise me by wire if satisfactory to ship. St. Clair M. Burns."

Q. He wired back it would be satisfactory?

A. He wired back "ship." "Your terms satisfactory. Ship the goods."

Q. Have you the copy here of the order?

A. I have the carbon sheet which is the only thing I have in my possession. The original order is at the factory, which is the same as this.

Q. This was taken off at the same time as the duplicate or triplicate?

A. Yes. There are three made. One goes to the factory, one to the salesman and one to the customer.

Mr. Harris: We will call this plaintiff's Exhibit C-1.

Q. And at the same time was another carbon paper given to Mr. Brown?

A. Yes. A blue print but not a tissue sheet.

Q. But one of the triplicates is given to the customer?

A. One to the customer, one to the factory and one the salesman retains in his order book.

131 Q. And you delivered the second one of the three to the Curtis Brown Company by handing it to Mr. Brown?

A. Yes.

Q. What else took place on that day?

A. That's all I recall.
Q. Were you present?
A. I was busy or something like that.
Q. Did you have any talk on that day about any previous order being placed with the firm of Crofut & Knapp?
A. No, I didn't.
Q. Did you hear him talk with anybody else about such an order?
A. No. But I do know there had been a controversy over a cancellation.
Q. But you didn't have any part in that?
A. No; that was not for me to decide. I merely acted as salesman.
Q. And you didn't hear the talk between Mr. Brown and Mr. Holmes?
A. No.
Q. Was there any other representative of your Company present at that time?
A. Not that I know of.
Q. Did you at that time, in the presence of Mr. Brown, have any talk with Mr. Holmes about this particular order?
A. Not that I know of.
Q. Did you report the sale to Mr. Holmes at that time?
A. Yes.
Q. In Mr. Brown's presence?
A. I think I did.
Q. That's your best recollection?
A. Yes.
Q. Can you recollect what you said about that in Mr. Holmes' and Mr. Brown's presence?
A. I don't think I can.

132 Cross-examination.

By Mr. Corn:

Q. Mr. Burns, you say that Mr. Brown first had a conversation with Mr. Holmes in which you took no part.
A. No.
Q. And you did not overhear any part of it?
A. No.
Q. Then you approached Mr. Brown and began to talk with him?
A. Yes. After he was through with Mr. Holmes.
Q. Did Brown tell you he had come for the purpose of buying goods?
A. No.
Q. Did he say anything to that effect at that time?
A. No.
Q. Then you started the subject of selling him these hats?
A. Yes, I brought up the conversation.
Q. What did you say in this respect?
A. I said, "Mr. Brown, we have some cancelled hats at the factory we are closing out for $39 a dozen."

Q. Isn't it a fact that he told you he had not come to New York for the purpose of buying goods?

A. We didn't discuss business at all until I brought up this subject of the hats.

Q. Didn't he say he wasn't interested, or that he wasn't buying goods at that time, or something of that sort?

A. That I don't remember.

Q. Now, when you told him you had these hats as you have just described them, what did he say?

A. He said, "Are they here?" I said, "No; they are at the factory." He said, "Can I see them?" I said "No." Then he told me *told me* to describe them, which I did to the best of my ability, and he told me what he would like to have.

133 Q. Then he ordered these hats without having seen them?

A. No, he didn't see them. These hats were at the factory at South Norwalk and he was in the salesroom at 251 Fifth Ave.

Q. Whose handwriting is on this order Exhibit C-1?

A. My handwriting.

Q. No part is in the handwriting of Mr. Brown?

A. No.

Q. Did Brown give you any written confirmation of the order?

A. Not at that time.

Q. Is that the way he has always bought goods?

A. He always bought goods subject to confirmation.

Q. You mean that you would mail him the confirmation and this confirmation came in mailed in that way?

A. It came in by mail.

Q. And this confirmation did not come in on the day the order was placed?

A. Not the day the order was placed.

Q. What is meant by "floor" hats?

A. That is goods we sell that are made to order for a customer, and those which are cancelled we put on the "floor" and sell them.

Q. That is, they are on your floor ready to dispose of for immediate delivery?

A. Yes.

Q. What sort of hats were these?

A. They were hats made up for other customers.

Q. That I understand—Were they hats for summer or winter wear, or spring or fall?

A. Mostly for this fall's wear, I would say.

Q. Men's hats or women's hats?

A. Men's hats.

134 Q. Is the first part of January the usual time to buy hats for fall wear?

A. No; it's the time to buy spring hats.

Q. Now what were the terms that you gave him on the day he gave you this order, which you say is January 5th, or did you give any time?

A. Our order sheet shows the terms as six, ten, thirty extra.

Q. And what was the date of the shipment as fixed on the order?

A. At once, express.

Q. Then he told you that he would send in the confirmation, did he?

A. Yes.

Q. Then when he sent in the confirmation he had put different terms on his confirmation?

A. Yes.

Q. Now, did you say the confirmation is also at the factory?

A. That's at the factory—it should be.

Q. Can you remember the terms on the confirmation?

A. The confirmation read: "Six Ten Sixty extra."

Q. Which meant that different terms were written out on his confirmation than on your order and that he ordered sixty days as against your thirty?

A. Yes. "Ship January 8th or cancel." I received his confirmation.

Q. Was there any agreement between you that the terms of delivery were to be January 8th or cancelled?

A. No.

Q. The terms were "at once"?

A. At once.

Q. Then you say that you telegraphed him concerning that discrepancy as to the terms of credit and terms of delivery, and that telegram you have read into the record, haven't you?

A. No; I read my wire to him. My telegram to Mr. Brown.

Q. May I look at it Mr. Burns?

135 Q. Now, Mr. Burns, this telegram was dated January 10th. On what day was the confirmation received at your office?

A. I received the confirmation on that date, January 10th. It came down from our factory on January 10th, to the best of my recollection.

Q. Well, if the date of the telegram is correct—January 10th—then it is also true you received the confirmation at your office January 10th?

A. If that is correct, that is the day I received the confirmation. I sent the wire immediately upon receiving his confirmation.

Q. Had you shipped the goods on that date?

A. No.

Q. When were the goods shipped, as a matter of fact?

A. I can't say.

Q. They hadn't been shipped on January 10th?

A. They haden't been shipped on that day. The wire was sent January 10th.

Q. And he sent you a wire which you say contained the words "Your terms satisfactory. Ship the goods."?

A. Yes.

Q. Is it not a fact that his answer to your telegram of January 10th was the first thing that you had in writing from him to the effect that he was willing to purchase on terms of Six, Ten, thirty extra?

A. Yes. But it was a telegram, saying that he would accept the

goods six-ten-thirty extra and to ship after January 8th. The confirmation called for January 8th or cancelled.

Q. At the time that you got this order from him on January 5th, which he said he took subject to confirmation, did he pay you any part of the purchase price?

A. No.

Q. Did you deliver any part of the goods to him at that time?

A. No.

136 Mr. Harris: I ask that the telegram which Counsel has been using in his cross-examination be marked Exhibit C-2, and I offer it in evidence.

By Mr. Harris:

Q. Now, have you any other papers or copies of papers which passed between you in this particular transaction?

A. That's all.

Q. Have you had any other communication with Mr. Brown of the Curtis Brown Company since January, 1921?

A. Yes. February 2, 1921.

Q. And any other time?

A. No.

Q. That was on February 2d?

A. February 2d.

Q. Did you see Mr. Brown here at that time in New York City?

A. Yes.

Q. At your place of business?

A. Yes.

Mr. Corn: I object to that on the ground that any subsequent visits of Mr. Brown to New York are immaterial.

Mr. Harris: I am just simply getting at a fact.

Q. At that time he ordered some goods for Curtis Brown Company?

A. Yes.

Q. At that time did you have any talk with him relative to his visit here on January 4th or 5th?

A. I don't just understand——

Q. You say you saw him here in New York, February 2d?

A. Yes.

Q. At that time, on February 2d, did you have any conversation with Mr. Brown relative to his previous visit here in January.

A. No, nothing was said relative to his previous visit. On
137 February 2d there was nothing said. He bought a bill of goods on February 2d.

Q. That's all that occurred at that time?

A. He said he was going to be involved in a law suit, that he was having trouble with Rosenberg Bros. and he asked me if anyone had been in to see me, and I told him yes; that he had asked me whether he had bought any goods, and I told him "Yes; about 10 dozen hats."

Mr. Burns recalled.

By Mr. Harris:

Q. Has the Curtis Brown Company, or Mr. Curtis Brown, at any time since January 5th, 1921, said anything to you relative to the orders given Crofut and Knapp prior to January 5, 1921?

A. No.

Q. Has anything been said to you or have you any information as to whether or not the proposition made by the Curtis Brown Company to Crofut & Knapp on January 5, 1921, and delivered in the testimony of Mr. Holmes, was or was not accepted?

A. I have heard nothing; in fact, I didn't know he had made Mr. Holmes a proposition to reduce. I thought the conversation was regarding orders of last fall or summer.

ST. CLAIR BURNS.

Sworn to before me this 21st day of February, 1921.

DODGE L. MARKS,
Referee.

Notary Public, Kings County, No. 195. Kings Co. Registerer's No. 1019. New York Co. Clerk's No. 19. New York Co. Register's No. 1171. Commission Expires March 30, 1921.

138 ROBERT A. HOLMES, being duly sworn by the Referee, testifies as follows:

Direct examination.

By Mr. Harris:

Q. You live where, Mr. Holmes?

A. Pelham, New York.

Q. Your business is what?

A. I am the Second Vice President and Sales Manager of Crofut & Knapp Company.

Q. That Company is a Connecticut corporation having its office where?

A. The main office is at South Norwalk, Connecticut.

Q. And your New York office?

A. The salesroom is at 251 Fifth Avenue and I have my office at 244 Fifth Avenue.

Q. Do you know Curtis Brown Company, of Tulsa, Oklahoma?

A. Yes, sir.

Q. Your concern has been doing business with it for some time?

A. Yes, sir.

Q. And was doing business with it in January, 1921?

A. Yes.

Q. And you know Curtis Brown, the president of that Company?

A. Yes. I assumed he was the president. I have always heard of him as such.

Q. And he has been in your place from time to time buying goods and discussing your relations?

A. I don't remember whether he has ever placed an order at the office before. That is usually done at Tulsa.

Q. He has called on you at different times in New York?

A. Yes.

139 Q. How ma-y times would you say you have seen him each year?

A. I don't remember to have seen Curtis Brown; I don't think I saw him last year. I would say that I haven't.

Q. You did see him in January, 1921?

A. Yes. At 251 Fifth Avenue.

Q. Will you go on and state exactly what was said at the time you saw him?

A. Well, after shaking hands we had the usual run of conversation and he brought up the matter of a controversy which he had had with our Finance Department in regard to the payment of his bills, and I told him that we frequently had difficulties between the sales end of the business and the financial end; that where they got to the point where the customer was good and mad and refused to buy any more goods of the house they turned it over to the Sales Department, as it was in his case. I told him it was a rather small matter, because, after all, we had been doing business together for a number of years; that he had built up his hat business on our merchandise, and, in my opinion, it was a poor thing for him to discontinue his relations with Crofut Knapp Company. I advised him to reinstate his order, and after some conversation along those lines he handed me his duplicate orders, including a duplicate confirmation which he had sent on from the previous order in question, and said "You can reinstate that portion of the order which was not cancelled at a previous date." "They have accepted cancellation of the balance." He said "I think I ought to get those felt hats cheap, and if you can ship those at $6 a dozen less, you can ship those along", and to that I said that I didn't see that we could do that, and I would take it up with the factory and see whether they would make that reduction and ship those goods. That was practically all there was to it.

140 Q. At this particular time he had with him certain papers?

A. Yes.

Q. Were you familiar with the subject-matter of the papers which Mr. Brown had with him?

A. To all practical purposes I was.

Q. The discussion referred to an order placed last fall for spring and summer goods, did it not?

A. Partially. It was for an order placed last July for straw hats for next summer's use, and those were all involved in a general cancellation which he had sent on.

Q. And your people had declined to accept the cancellation?

A. I should say they had. Yes.

Q. And this matter was taken up by him with you in New York City, he having what purported to be copies of the orders and of his confirmation?

A. Yes.

Q. Now, at that time, is it not the fact that upon eleven dozen of the hats described in those papers, the price, in the discussion between you and him, was changed from $78 to $72?

A. No, sir. He made that proposition to me in an offhand kind of way.

Q. He made that proposition to you?

A. Yes, sir.

Q. That proposition was put down in what form?

A. I don't think there was any record made of it. I had to go to the factory the next day. I don't recollect whether I wrote the factory—I think I did; I wrote the factory that Mr. Brown stated he would accept those goods if a reduction of $6 per dozen was made. I took the copies he had with him and this letter which I had written and I met the Treasurer or the Third Vice President of our
141 Company up town that day and I told him about it and I put the papers in the factory mail.

Q. That same day you discussed with him what Mr. Brown had discussed with you?

A. Yes.

Q. And that same day you put in what you had to say to the factory with Mr. Brown's proposal and mailed them to South Norwalk, Connecticut—to the home office?

A. Yes.

Q. Now, in this proposition which Mr. Curtis Brown delivered to you on that day was embodied the cancellation of a certain portion of the order and his confirmation as to the balance of that order?

A. I don't know if I get the first part of your question in connection with the last.

Q. Mr. Brown last summer had given your concern an order.

A. Yes.

Q. Subsequently, he sought to cancel it?

A. Yes. Your people declined to accept the cancellation?

A. Of a certain portion, yes.

Q. On January 5th, or the day you saw him in New York, he delivered to you a paper which involved the cancellation of a certain portion of the fall order and the confirmation of the remainder by the Curtis, Brown Company?

A. You don't mean the fall order?

Q. The order given last fall for the spring of 1921?

A. I don't recall any cancellation of the order given last fall except the question of his accepting that portion of the goods which were made up.

Q. He was to confirm as to that portion which was made up?

A. If the factory accepted his proposition.

Q. And on the eleven dozen hats the price was to be reduced from $78 to $72?

A. Yes.

142 Q. And that was his proposition through you to Crofut & Knapp?

A. Yes.

Q. The deal was between the Curtis Brown Company and Crofut & Knapp, and so what he did was act for the Curtis Brown Company and you were acting for Crofut & Knapp?

A. Yes.

Q. Do you remember the aggregate amount of merchandise which was ordered last fall?

A. No; I do not. If I recollect it that was a detail that I didn't pay any attention to.

Q. You did give Mr. Strauss some information when he was down here?

A. Mr. Strauss——?

Q. He is Treasurer of Rosenberg Bros.

A. Yes.

Q. Do you remember that the papers which Mr. Brown delivered to you on that day involved the cancellation of some $1,500 of hats which he had previously ordered, and confirmed the order as to the balance?

A. These were carbon copies of his original confirmation in which he confirmed the whole order. Across one sheet was written "Cancelled" on a certain date. That cancellation was accepted by the factory. The cancellation of the remainder was the one in question, and that I couldn't even guess as to what the amount of the orders was, because I didn't pay any attention to it.

Q. Well, now, I am going to ask you this Mr. Holmes: Will you produce, for the purpose of having copies made and attached to your testimony here, the papers which you transmitted to the factory in Connecticut?

A. I would be perfectly willing to do it, but I can't do it because they were returned to Curtis Brown at his request. They were matters of his own record. He requested me to have them
143 returned to him and I instructed the factory to do so, and I assume that they were so returned.

Q. Will you produce, for the purpose of having copies made, as part of your testimony, the papers which you transmitted to the office in Connecticut, to the extent that the office has them?

A. Well that would only be the letter which I wrote in connection with that transaction. I will be perfectly willing to do that if you wish it.

Q. Mr. Holmes, may I ask you this: In the event that the papers delivered to you by Mr. Brown on this particular day, which you transmitted to your home office, are no longer in the possession of the office, will you produce, to be attached to your testimony, the letter you wrote the home office, or the copy thereof, and the letter which the home office, or a copy thereof, wrote Mr. Brown, together with a memorandum of the entry or copies of the entries made upon your books or the books of the corporation in that particular transaction?

A. As far as I am concerned, I would be perfectly willing to do it.

7
5

Mr. Corn: I object to the production of correspondence between Mr. Holmes and the factory of Crofut & Knapp Company, on the ground that correspondence between Mr. Holmes and the factory cannot constitute evidence against the Curtis Brown Company on this motion, as the question at issue is whether it was a transaction of business for the Company, and letters of that sort, such as are requested, are not competent on that subject.

Q. Now, Mr. Holmes, have you seen Mr. Brown since January 5th?

A. Yes.

144 Mr. Corn: Objected to as immaterial.

A. I saw him at 244 Fifth Avenue.

Q. When?

A. I haven't any way of fixing the date. I should say within a week.

Mr. Burns: It was Monday or Tuesday of this week.

Q. On that occasion, did you have any talk with him about these papers which he delivered to you on January 5th or the proposition he made on that date?

Mr. Corn: I object to that as immaterial, on the ground that the question at issue is whether he was doing business for the Company or not.

Q. On that occasion was anything said to him about his proposition being accepted, that the matters suggested had been put through or anything?

A. No.

Q. You are one of the officers of this corporation?

A. Vice-President.

Q. Do you know whether or not the proposal made by Mr. Brown on the occasion which you have described was accepted by your corporation?

A. No; I have no knowledge of it. I can simply assume that it was. I heard nothing further.

Q. So far as you know, it was accepted?

A. Yes.

Q. Who are your associate officers?

A. Philip N. Knapp, President; John Cavanagh, Vice-President and General Manager; Irving R. Wilmot, Third Vice-President; F. H. James, Treasurer. I think Mr. Wilmot is also Secretary, but I am not sure, I have forgotten.

Q. Mr. Wilmot is in general charge of the sales?

A. He is in general charge of the financial business.

145 Q. Has he stated to you as to whether or not the proposition which you sent over to the Company in Connecticut which you received from Mr. Brown was or was not accepted?

Mr. Corn: I object on the ground that this is not a proper question but a mere fishing excursion. It is perfectly obvious that a con-

versation between an officer of one concern and and officer of another cannot be competent as against the Curtis Brown Company.

Mr. Harris: I am not asking for a conversation. I am just asking for a fact.

A. I have no recollection of any conversation which Mr. Wilmot had with me or any other officer at that time.

Q. Mr. Wilmot was here when Mr. Strauss was here?

A. Yes. I was so advised by Mr. Wilmot, but was not present at the conversation the day he had seen Mr. Strauss.

Mr. Corn: I object on the ground that this is purely a fishing excursion and we are encumbering the record with a lot of immaterial inquiries. I object to this upon the ground that it is perfectly obvious that the question cannot be directed to any fact which is relevant to the question at issue on this motion—it is a mere fishing excursion.

Mr. Harris: All right, sir.

Q. I want to ask you if Mr. Wilmot or any other executive officer of your corporation in Connecticut has at any time advised you since January 5, 1921, as to whether or not the proposition
146 which you transmitted to the Company which you received from the Curtis Brown Company, had been accepted or not accepted?

Mr. Corn: I object to that upon the ground that it is immaterial, irrelevant and incompetent to ask an officer of Crofut & Knapp whether he received a communication from another officer of Crofut & Knapp.

Q. At any time since January 5, 1921, has the Curtis Brown Company, or Curtis Brown stated to you what action your corporation had taken upon the subject of the proposition delivered to you on that day?

A. No.

Q. So that you don't know whether that proposition was in any particular or in any way ever acted upon?

A. No, sir. I haven't been on a "fishing excursion."

Cross-examination.

By Mr. Corn:

Q. Now, Mr. Holmes, do you remember the exact date that Brown got to your place in the early part of January that you are speaking of?

A. No. I have no way of fixing the date, except by the order that has been spoken of.

Mr. Corn to Mr. Harris: Do you know what that date was?

Mr. Harris: January 5th.

Q. When Brown came into your place on that day he spoke first to you, did he not?

A. Why, I don't know—what do you mean, greeted me first?

Q. I mean you were the first person in the place who spoke to him?

A. Oh, no. They sent for me; they telephoned me that Mr. Brown was there and I came over.

147 Q. And do you happen to remember who it was that telephoned for you?

A. No.

Q. Then he began to talk with you about these previous orders, is that right?

A. I don't know—do you mean, is that what opened up the conversation between us?

Q. Yes.

A. I don't think I would allow the conversation to be opened up that way in a case of that kind. I established our friendly relations first.

Q. Then finally when the "How's-your-mother" part was over, as our friend Burns said.

(A. He got that from me; I claim full credit for that.)

Q. What I want to ask is this: Did you start the talk in regard to these previous orders or did he start the talk?

A. I should say that I did, propably.

Q. Now, the situation at that time in regard to these orders was that he had cancelled most of them?

A. Everything.

Q. Oh, he cancelled everything?

A. Everything.

Q. So there was a controversy between the Curtis Brown Company and Crofut & Knapp Company on the subject of the liability of the Curtis Brown Company on these orders?

A. They sent down to my office a batch of correspondence which showed that they had got into a jamb with Curtis Brown, and he told them to cancel everything on their books; that he was through with them. I then took the matter up with Curtis Brown myself and wrote him. I don't remember what was in the letter, but I said that that was not the way to get at the matter; that we had been doing business together for a good many years, and that we had better settle the thing up. I think the main point was they

148 couldn't get a letter from him, and I told them I could get a letter from him and I did. In January I told him he was just as much to blame as anybody else, and I said "Now, you better let the order stand as it is", and he pulled the papers out of his pocket and said "That part of the cancellation they have accepted; the rest of the order you can put in again. But I think on the felts I ought to have a reduction of $6 a dozen because it is pretty hard to sell goods at those prices." I said "I will not go into that phase of the matter; I will put it up to the factory.

Q. Now, that batch of papers that you have spoken of simply consisted of copies of these orders?

—. No.

Q. Well, they were the carbon copies of the orders, and attached to them were the carbon copies of his confirmations?

A. They might have been; I don't know exactly about that.

Q. Now, as to the part that was marked "cancelled." The fact was Crofut & Knapp had accepted cancellation of that part of the order?

A. That was it.

Q. Then the question which existed between your concern and the Curtis Brown Company was as to the balance of the orders, and as to those he ordered a reduction on practically all of them?

A. No; only a small portion. There was only eleven dozen.

Q. Then the controversy narrowed down to these felts?

A. The controversy was all in regard to financial matters and the matter of cancellation didn't come up until the financial end of the business had got to the point where Mr. Brown got up in the air and cancelled everything he had and said he wasn't going to do any more business with them.

149 Q. Then this cancellation of all of the orders took place prior to the January meeting?

A. Yes.

Q. So this January meeting was for the purpose of smoothing out the difficulties between you.

A. That was the purpose of the meeting on my part.

Q. In this letter you wrote him you stated you desired to get into communication for the purpose of taking the question up with him?

A. Yes.

Q. And when you got him down in January, that is what you were talking about?

A. Yes.

Q. And there was a part cancelled, which were to be cancelled; then there was another part concerning no cancellation, and still another part where he wanted a reduction?

A. Well, that was the situation as it developed, as he said he wanted to get a $6 reduction.

Q. You didn't settle the matter then and there?

A. No.

Q. So far as you know it has never been settled to this day?

A. So far as I know it has never been settled.

Q. Which was the order which was cancelled in its entirety?

A. There wasn't either one of them.

Q. I mean the one you consented to the cancellation of.

A. That was a portion of the straw hat order.

Q. Then, as to the balance of the straw hat order, did he want a reduction, or was that the part he was willing to let stand?

A. That was the part he was willing to let stand.

Q. To summarize: There were two orders; a straw order and a felt order. The straw order was accepted in part and cancelled in part?

A. Yes; not finally.

Q. And then as to the felt order he wanted a reduction
150 which you have never consented to up to this very day.

A. As far as I am concerned, I was willing to do it, and under ordinary circumstances I would have said "Sure, you can have it" but I thought that we had better let the thing go up to the factory and let him take it up with them.

Q. You had no later talk at the time Mr. Burns took charge of him?

A. I remember I was present, and he said "You can send me ten or twelve dozen, and I think Burns was inclined to accept ten dozen, but I said "He said ten or twelve," and I walked out.

Q. When Mr. Burns began to take charge of him in selling these goods the controversy in regard to the previous orders was over?

A. I believe so.

By Mr. Harris:

Q. I now ask if that corporation accepted the proposition which you submitted to it on January 5th?

A. I don't know.

Q. Will you ascertain?

A. I am perfectly willing to. I don't know of any reason why I shouldn't.

At the request of Mr. Harris, I have produced, subsequent to the hearing, the following, marked as follows:

"For Identification."

C 3. Carbon copy of Curtis Brown Co., Tulsa, Okla., soft hat order dated October 18th, 1920, showing original prices, and corrected prices.

C 4, 5 & 6. Carbon copies of Curtis Brown Co. straw hat orders dated July 25th, 1920, numbered 45, 46, 47, showing cancellation on Nov. 12, 1920, and memorandum to reinstate at revised prices.

C 7. Memorandum in Mr. Holmes' handwriting, with typewritten notation in regard to 1 dozen $108 hats made up.

151 C 8. Memorandum to Mr. Burke, showing felt order O. K. as per yellow sheet.

C 9. Original order W 72, written by Mr. Burns on January 5th, 1921, for 10 dozen felt hats, off the floor. Factory tickets attached. Lot G-13964-75.

C 10. Confirmation of Curtis Brown Co., #748, for 11 dozen felt hats, dated January 5th, 1921. G 14138.

C 11. Original letter to Mr. Holmes, concerning terms on confirmation above mentioned, with Mr. Holmes' notation thereon and memorandum affixed at factory of O. K. by Mr. Johnstone over the phone.

C 12. Original telegram from Curtis Brown Co., confirming our terms and asking rush shipment of order.

Pursuant to the request of Mr. Harris made at the hearing, the Referee, at the time of my signing my testimony, has put the question to me, "Did the Crofut & Knapp Company ship the merchandise to the Curtis Brown Company under the arrangement which you made with Curtis C. Brown in New York City on January 5th, and if so, when?"

By the Referee: As requested by Mr. Corn, his objection to this question is noted on the record of the witness.

A. I don't know; I presume so.

ROBERT A. HILMES.

Sworn to before me this 28th day of February, 1921.

DODGE L. MARKS,
Referee.

Notary Public, Kings Co., No. 105.
Kings Co. Register's No. 510.
New York Co. Clerk's No. 19.
New York Co. Register's No. 1171.
Commission expires March 30, 1921.

152 EXHIBIT C 1.

72 Jan. 5, '21.

Curtis Brown Co., Tulsa, Okla.

At once Express.
His die.

St. M. Burns.

5 Seal Browns	His die	....	42.00
2 Black	On leather	....	42.00
2 Green	" "	....	42.00
1 New Riviera Green	" "	....	42.00

These are 39.00 hats off floor. 3.00 Extra for printing leather. Wants some smooth finish. Also like light weights. Some rough finish. If any silk lined give him some.
The order telephoned up by Tom Johnstone.

153 EXHIBIT C-2.

Charge to the account of the Crofut & Knapp Co.

Western Union Telegram.

January Tenth, 1921.

Curtis Brown Co.,
Tulsa, Oklahoma:

Holding up order as your confirmation says ship January eighth or cancel. Confirmation received January eighth. Had to print

die. Terms six ten thirty extra not sixty. Advise me by wire if satisfactory.

ST. CLAIR M. BURNS.

154 EXHIBIT C-7 FOR IDENTIFICATION.

Mr. Burke—Letter O. K. per yellow sheet. Stamp not affixed a/c of its being returned.

EXHIBIT C-8 FOR IDENTIFICATION.

Received Jan. 7, 1920, the Crofut & Knapp Co.
Show this to I. R. W.
Return these sheets to R. A. H.

Mr. Holmes said if 1 doz. of the $108 hats could not be canceled, to let it go with the shipment. Mr. Wilmot said in that case to reduce price to $102 per doz.

155 EXHIBIT C-11 FOR IDENTIFICATION.

The Crofut & Knapp Company.

Knapp Felt Hats.

South Norwalk, Connecticut.

H. Read.

Received Jan. 11, 1920. The Crofut & Knapp Co.

January 8, 1921.

Mr. R. A. Holmes,
244 Fifth Avenue,
New York City.

DEAR MR. HOLMES:

In confirmation with our telephone conversation of this morning regarding order for Curtis Brown Company:

We enclose copy of the order and you will note they have marked Terms, Regular 6/10—60 extra.

In accordance with your instructions we are not going to ship this order until we hear from you.

Yours very truly,

THE CROFUT & KNAPP COMPANY.

W./B. 1.

O. K. per T. Johnston over phone.
Burns has wired about this. Will advise. R. A. H.

Department Hdx C+C3 for Label Labe

Checked against invoice by

WE RESERVE THE RIGHT TO REFUSE OR RETURN AT ANY TIME ALL OR ANY PART OF ANY SHIPMENT MADE TO US AFTER THE SPECIFIED SHIPPING DATE ON THIS ORDER. NO ORDER IS VALID UNLESS SIGNED BY THE SALESMAN AND BUYER.

Ordered of Corbett Knapp Co. A

DIRECTIONS FOR INVOICE—Separate bill required for e

Number	Description	No. Items	A 30 6½ 8
Sachard	Dsk 5½ x 2¼	1½	
"	Skel 5½ x 2¼	1½	
"	Fch Bro 5½ x 2¼	1½	
Starr	" " 5½ x 2½	1½	
"	Skel " 5½ x 2¼	1½	
Scatley	" 5½ x 2¼	1½	
	Bck 5½ x 2¼	1½	
L Perkins	" 5⅞ x 2½	½	
" "	Skel Bro 5⅞ x 2½	½	
		11½	
Suffell	Walnut Hy 5½ x 2¼	1	
"	Bck " 5½ x 2¼	1	
"	62 "	1	
		3	
	Ft.		

Terms as before Date Oct 18

Curtis Brown Co.

TULSA, OKLA.

No. of Order

ANY UNSHIPPED PORTION OF THIS ORDER, IS AUTOMATICALLY CANCELLED ONE DAY AFTER SPECIFIED SHIPMENT DATE. WE RESERVE THE RIGHT TO COUNTERMAND THIS ORDER IN CASE OF FIRE, EARTHQUAKE OR ANY OTHER CASUALTY AFFECTING OUR PREMISES.

Ship to Howard Conn City How ship Ext When as Wished

department. Enter Dep't and Order No. on each Invoice. A guarantee must be attached to all invoices, covering Child Labor Act.

C	D	13½	14	14½	15	15½	16	16½	17	17½	18	Price	Amount	Retail
32	33	34	35	36	37	38	39	40	42	44	46			
6¾	6¾	7	7¼	7½	7¾	7¾	7/8							
9	9½	10	10½	11	11½	12								
1	2	5	5	2	1		26	Lagr	Tuck	Ka	Hi	~~78~~	~~72~~	
1	5	A	5	2	1		"	"	"	"	"	~~78~~	"	
1	3	5	5	2	1		"	"	"	"	"	~~78~~	"	
1	3	6	5	3			"	"	"	Sele	"	~~78~~	"	
1	3	6	5	3	1		"	"	"	"	"	~~78~~	"	
1	3	1	1	3	1		26	"	"	Back	"	80	74	
1	3	4	1	3	1	1	"	"	"	"		80	74	
1	1	4				2	2	(22)	"	Sele	"	78	72	
						2	2	(22)	"	"	"	78	"	
													786	
1	2	3	3	2	1	Thick Cro Edge				Sele	Ends	108		
1	2	3	3	2	1	"	"	"	"	"	"	108		
1	3	3	3	2								108	30	

Cancelled 10/19 Later

THE CROFUT & KNAPP COMPAN

251 Fifth Ave., New York. 12 West St., Boston. 742 M

FACTORIES—South Norwalk, Conn.,

No. 42

BOUGHT BY Curtis Brow

SHIP Feb 1st SHIP VIA

DIE AT

PURCHASE SIGNATU

SA

It is understood and agreed that cancellations will
We accept no responsibility for delays or accidents

(FOR OFFICE ONLY)	DOZ.	STYLE	COLOR	WEIGHT	FINISH	FLOCK
	1/6	146	Rose	Lap	Brin	
	1/6	〃		〃		
	1/6	〃		〃		
	1/6	102		〃		
	1/6	〃		〃		
	1/6	〃		〃		
	1/6	〃		〃		
	1/6	188		〃		
	1/6	〃		〃		
	1/6	〃		〃		
	1/6	〃		〃		
	1/6	216	Braid 188	〃		
	1/6	〃	〃	〃		
	1/5	〃	〃	〃		
	1/5	〃	〃	〃		
	1/4	218		〃		
	1/6	〃		〃		
	1/6	〃		〃		
	1/6	〃		〃		

ket St., San Francisco
lford, Conn. and New York

Co. Tulsa, Okla.

Right - REFERENCES

E Terms 1% 10th Prox 6/10

ESMAN Carter:

t be accepted after order has been placed in factory for production
yond our control

TERMS ON ALL GOODS
F. O. B. SHIPPING POINT

Interest will be charged on accounts remaining unpaid after they become Net.
Partial deliveries are to be accepted and paid for at price and terms herein specified.

MEN'S FELT HATS, SILK HATS and CAPS
LADIES' MILLINERY and SILK HATS
30 days for remits on both original and duplicate orders. 2% in 10 days, 1% in 30 days, after that Net.

MENS' STRAW HATS
Sewed Braids, Leghorns, Sanghoks, Ballibuntals and Panamas
On original orders, June 1st dating. On duplicate orders, no dating and no transit allowance.
5% in 30 days, 3% in 30 days, after that Net.

KEEP	STYLE	FOR OFFICE ONLY	CURL	BRIM	BOW	BAND	LINING	LEATHER	DIE	PRICE	QUAN.	6½	6¾	6⅞	7	7⅛	7¼	7⅜	7½	7⅝	7¾	7⅞
	28				55		Leat Grey	#21	Ouray	42 -	63		1	3	5	5	3	1		= 18		
	28			"			"	"	Blair	42 -	63			2	3	5	5	2	1	= 18		
	28			"			"	"	"	42 -	63			1	3	4	5	3	1	1	= 18	
	28			"			Pro Main	#26	Atlanta	53 -	95	50	1	3	5	5	3	1		= 18		
	28			"	77		"	#26	Blair	53 -	95	50		2	3	5	5	2	1	= 18		
	28			"	"		"	"	"	53 -	95	50		1	3	5	5	3	1	= 18		
	28			"	"		"	"	"	53 -	95	50			3	4	5	3	2	1	= 18		
	28			7" Bind	55		"	"	"	53 -	95	50	1	3	5	5	3	1		= 18		
	28			"	"		"	"	"	53 -	95	50				do				= 18		
	28			"	"		"	"	"	53 -	95	50	1	2	5	5	3	2		= 18		
	28			"	"		"	"	"	53 -	95	50			3	4	5	3	2	1	= 18		
	2		Beg Brown	7" Bind			Main			63 -	94	50	1	2	5	5	3	2		= 18		
	2		"	"			"			63 -	94	50		2	3	5	5	2	1	= 18		
	2		"	"			"			63 -	94	50				do				= 18		
	2		"	"	"		"		"	63 -	94	50		1	3	5	5	3	1	= 18		
	2		"	7" Bind	119		"		"	63 -	94	50	1	2	5	5	3	2		= 18		
	2		"	"	"		"		"	63 -	94	50		1	3	5	5	3	1	= 18		
	2		"	"	"		"		"	63 -	94	50				do				= 18		
	2		"	"	"		"		"	63 -	94	50				do				= 18		
											1629											

Cancelled
No 12
See letter

THE CROFUT & KNAPP COMPAN

251 Fifth Ave., New York. 12 West St., Boston. 742 M

FACTORIES—South Norwalk, Conn.,

No. 46

BOUGHT BY: Curtis Bro

SHIP Feb 1st SHIP VIA Fre

DIE AT _____ PURCHASI FIRM'S SIGNATU

SA

It is understood and agreed that cancellations will
We accept no responsibility for delays or accidents

LOT NO. (FOR OFFICE ONLY)	DOZ.	STYLE	COLOR	WEIGHT	FINISH	BLOCK
	1 6	156		Flex		
	1 6	182		"		
	1 6	"		"		
	1 6	172				
	1 6	175				
	1 6	176				
	1 6	133	Reverse Lap Brim			
	1 6	"		"		
	1 6	"		"		

NY

Market St., San Francisco
Milford, Conn. and New York

Date July 25-'20

F.C.S
[illegible]

TERMS ON ALL GOODS
F. O. B. SHIPPING POINT

Interest will be charged on accounts remaining unpaid after they become Net.
Partial deliveries are to be accepted and paid for at price and terms herein specified.

MEN'S FELT HATS, SILK HATS and CAPS
LADIES' MILLINERY and SILK HATS
30 days for transit on both original and duplicate orders.
6% in 10 days, 5% in 20 days, after that Net.

MENS' STRAW HATS
Sewed Braids, Leghorns, Bangkoks,
Balibuntals and Panamas
On original orders, June 1st dating. On duplicate orders, no dating and no transit allowance.
6% in 10 days, 5% in 20 days, after that Net.

[illegible] Co - Tulsa. Okla

[illegible]ight

REFERENCES

URE

Terms June 1st 6/10 - 2 [illegible]

ALESMAN Carter -

not be accepted after order has been placed in factory for execution
beyond our control

DEEP	BRIM	RDG. FOR OFFICE ONLY	CURL		BOW	BINDING		LEATHER	DIE	PRICE	QUAL.	6½	6¾	6¾	6¾	7	7⅛	7¼	7⅜	7½	7⅝	7¾
3⅜	2½																					
3⅜	2				116			421	[illegible]	54 -	81		1	2	3	5	5	2	=	18		
3⅜	2				[illegible]			426	[illegible]	69 -	103	50		1	3	5	5	3	1	=	18	
3⅜	2¼				"			"	"	69 -	103	50	1	2	4	5	4	2	=	18		
3⅜	2⅜		26	3063	[illegible]		gold	"	"	66 -	99			1	3	5	5	3	1	=	18	
3⅜	2⅜			[illegible]			[illegible]	"	"	48 -	72			1	3	5	5	3	1	=	18	
3⅜	2			3	119			"	"	60 -	90			1	3	5	5	3	1	=	18	
3⅜	2		24	3063	"			"	"	48 -	72		1	2	4	5	4	2	=	18		
3⅜	2			[illegible]				"	"	48 -	72			1	3	5	5	3	1	=	18	
3⅜	2⅜		22	77				421	"	48 -	76				3	4	5	4	2	1	=	19
3⅜	2⅜			"	"			"	"		769											
3⅜	2½			"	"			"	"													

Net

Cancelled
Nov 12-20
See letter

1 69

THE CROFUT & KNAPP COMPAN

251 Fifth Ave., New York. 12 West St., Boston. 742 M

FACTORIES South Norwalk, Conn.,

No. 47

BOUGHT BY Curtis Brown

SHIP April 15th SHIP VIA Fr

DIE AT _____ PURCHASING FIRM SIGNATU

S

It is understood and agreed that cancellations will
We accept no responsibility for delays or accidents

LOT No. (FOR OFFICE)	DOZ	STYLE	COLOR	WEIGHT	FINISH	BLOCK
	1/6	133	Rosewood Lap Brim			
	1/6	"		"		
	1/6	"		"		
	1/6	188		"		
	1/6	"		"		
	1/6	"		"		
	1/6	"		"		
	1/6	216	Braid 188	"		
	1/6	"	"	"		
	1/6	"	"	"		
	1/6	"	"	"		
	1/6	218		"		
	1/6	"		"		
	1/6	"		"		
	1/6	184		Fur	(2¾	
	1/6			"	Cancelled	

OCT 30 1908

Cancelled

arket St., San Francisco
Milford, Conn. and New York

E + C L
for credit

Co. - Tulsa - Okla -

ight

REFERENCES

Terms June 1st 6/10
9 A

RE

LESMAN - Carter -

not be accepted after order has been placed in factory for execution
beyond our control

Date

TERMS ON ALL GOODS
F. O. B. SHIPPING POINT

Interest will be charged on accounts remaining unpaid after they become *Net*.
Partial deliveries are to be accepted and paid for at price and terms herein specified.

MEN'S FELT HATS, SILK HATS *and* CAPS
LADIES' MILLINERY *and* SILK HATS
30 days for transit on both original and duplicate orders. 6% in 10 days, 5% in 30 days, after that *Net*.

MENS' STRAW HATS
Sewed Braids, Leghorns, Bangkoks, Balibuntals and Panamas
On original orders, June 1st dating. On duplicate orders, no dating and no transit allowance.
6% in 10 days, 5% in 30 days, after that *Net*.

CROWN	BRIM	RING FOR OFFICE ONLY	COLOR	BAND	BOW	BINDING	LINING	LEATHER	DIE	PRICE	QUAL.	6½	6⅝	6¾	6⅞	7	7⅛	7¼	7⅜	7½	7⅝	7¾
3⅜	2¼			32	77		Gr	421	Lobbs Reo	48 -	7x		1	2	4	✓	4	2		=	18	
3⅜	2⅜			"	"		"	"	Theiss	48 -	7x			1	3	✓	✓	3	1	=	18	
3½	2½			"	"		"	"	-	48 -	76				3	4	✓	4	2	1	=	19
3⅜	2⅜			32 Black	✓✓		Brd Grain	426	"	57 -	83		1	2	4	✓	4	2		=	18	
3⅜	2¼			"	"		"	"	"	57 -	83			1	3	✓	✓	3	1	=	18	
	2¼			"	"		"	"	"	57 -	83					do				=	18	
3½	2½			"	"		"	"	"	57 -	83			1	3	✓	✓	3	1	=	18	
3⅜	2		Red Cocoa	"	"		Gold Grain	"	"	63 -	94	50	1	2	✓	✓	3	2		=	18	
3⅜	2¼		"	"	"		"	"	"	63 -	94	50		2	4	✓	4	2	1	=	18	
3½	2⅜		"	"	"		"	"	"	63 -	94	50				do				=	18	
3½	2⅜	✓	"	"	"		"	"	"	63 -	94	50		1	3	✓	✓	3	1	=	18	
3⅜	2¼		"	32 Brn	119		"	"	"	63 -	94	50	1	2	✓	✓	3	2	=	18	
3⅜	2¼		"	32 Brn			"	"	"	63 -	94	50		1	3	✓	✓	3	1	=	18	
3½	2⅜		"	"			"	"	"	63 -	94	50		1	3	✓	✓	3	1	=	18	
[illegible]				32 Red	✓✓		"	"	"	65 -	103	50		1	3	✓	✓	3	1	=	19	
3⅜	2¼			"	"		"	"	"	69 -	103	50	1	2	4	✓	4	2		=	18	
										$1400												
										~~3800~~												
										(66 Doz)												

Cancelled Oct 30 -W
Oct 30 CB

60
12
14

Average $7.85
4.82

Department Skats

Checked against invoice by

WE RESERVE THE RIGHT TO REFUSE OR RETURN AT ANY TIME ALL OR ANY PART OF ANY SHIPMENT MADE TO US AFTER THE SPECIFIED SHIPPING DATE ON THIS ORDER. NO ORDER IS VALID UNLESS SIGNED BY THE SALESMAN AND BUYER.

Ordered of Profit Knapp

DIRECTIONS FOR INVOICE—Separate bill required for

Number	Description	No. Items	A 30 6½ 8
Asst	Skates Sick finish Models	11	
Make out tickets for 1 to 9	1 4 1 3 8		
	additional ticket		

156 EXHIBIT C-12 FOR IDENTIFICATION.

Western Union Telegram.

1921, Jan. 12 A. M., 1.37.
Received at 12 W. 31st St., N. Y., Mad. Sqr. 6543.

1921, Jan. 12, A. M., 12.46.

D919A. 18 Nite.
Tulsa, Okla., 11.
886.

Crofut & Knapp Co.,
251 Fifth Ave., New York, N. Y.:

Answering your night letter confirm order and terms as you state excuse my mistake, rush shipment soon as possible.

CURTIS BROWN CO.

Received Jan. 13, 1920. The Crofut & Knapp Co.

(Here follow reproductions of Exhibits C3, C4, C5, C6, C9, C10, marked pages 157-162, inclusive.)

163 LOUIS LASK, being duly sworn by the Referee, testifies as follows:

Direct examination.

By Mr. Harris:

Q. What is your full name?
A. Louis Lask.
Q. Where do you live?
A. 935 St. Nicholas Avenue, New York City.
Q. And what is your business?
A. Secretary of the corporation of Blum & Koch.
Q. And Blum & Koch are a corporation organized under the laws of what state.
A. The State of New York.
Q. And doing business where?
A. 76 Madison Avenue.
Q. Do you know the Curtis Brown Company?
A. What do you mean by that question?
Q. I mean what I say. Do you know the Curtis Brown Company?
A. Well, we are dealing with them.
Q. And your corporation does business with them?
A. If they are a corporation we do business with them.
Q. How long have you known them?
A. Well, I can't tell you the exact date. We have them on the books about five years.
Q. Do you know Curtis Brown the president of the Curtis Brown Company?
A. Only from seeing him in our office some time in January.
Q. Did you ever see him before?
A. I might have. I haven't any recollection.
Q. What are your duties with the firm of Blum & Koch?
A. I have charge of the correspondence credits and general office and the finances to a certain degree; sometimes I sell goods right here in the city, I don't go on the road, and various other matters appertaining to the factory.

164 Q. And you have been in that position how long?
A. Well, I have been Secretary of the Company ever since it has been incorporated. Previous to that I was with the old concern many years.
Q. And you were in January of this year?
A. Yes, sir.
Q. You were asked to produce here orders placed with your concern prior to January 5, 1921 and for the spring and summer season of 1921?
A. Yes, sir.
Q. Can you produce them?
A. No; you heard me telephone for the sheet.
Q. You have not produced them, but you telephoned for them?

A. You heard me tell Mr. Richold, and he said he would bring them down with him.
Q. You have produced here certain correspondence?
A. Yes.
Q. I quote you a letter of December 27, 1920 and ask whether this was written by you?
A. Yes.

Mr. Harris: I offer this in evidence and ask that it be marked "K 1".

"December 27, 1920.

"Curtis Brown Co.,
Tulsa, Oklahoma.

GENTLEMEN:

"We are in receipt of your favor of the 21st inst., and in accordance with your request, will hold your spring order in abeyance awaiting the pleasure of a call from your Mr. Curtis Brown, who you state expects to be here some time in January.
"With compliments of the season, we remain
"Yours truly,

"BLUM & KOCH, INC."

165 Q. This letter, Exhibit K 1, refers to the favor of Curtis Brown Company of December 21st. Have you produced that?
A. No; I have not.
Q. Do you know where it is?
A. No, sir.
Q. Have you made any search for it?
A. I didn't look for the letter at all. I simply told my girl to get all the correspondence in the files in this matter and give it to me.
Q. Will you have a search made for that, please?
A. Yes.
Q. Now, you have also produced here certain invoices?
A. Yes.
Q. From Blum & Koch to Curtis Brown Company of Tulsa, Oklahoma?
A. Yes.
Q. Those are all duplicate copies of the originals?
A. Yes.

Mr. Harris: I offer in evidence the first invoice under date of January 26, 1921 on a blue sheet, which I ask to have marked "Exhibit K 2", that being in the amount of $231; and an invoice of January 26, 1921, amounting to $865.50, which I offer in evidence and ask to have marked "K 3".
Mr. Corn: I object to both of them as being immaterial to the issues raised on this motion.
Mr. Harris: I also offer in evidence a credit-memorandum under

date of February 2d on the billhead of Blum & Koch and ask to have this marked "K 4".

Mr. Corn: I object to it on the ground that it is immaterial and irrelevant to the issues on this motion.

166 Mr. Harris: And credit memoranda on blue letterhead, which I ask to have marked "K 5".

Mr. Corn: Same objection.

Mr. Harris: I also offer invoice under date of February 2d on a blue sheet amounting to $682.50 and one of the same date on a white sheet for $1,383.75, and ask to have those marked "Exhibits K 6 and K 7".

Mr. Corn: Same objection.

Q. Now, was there a time when you saw Curtis Brown in the City of New York during the month of January, 1921?

A. No, sir.

Q. During the month of January 1921?

A. Oh, I see what you mean—other than in our office?

Q. No; in your office?

A. In our office, as I explained heretofore.

Q. What day was that?

A. I cannot tell you.

Q. Can you tell by a reference to any papers?

A. It was probably somewhere around the receipt of that letter where he acknowledges receipt of the calendar. January 18th the letter was sent; I should judge anywheres between the 10th and the 15th.

Q. You saw him then in New York City?

A. Yes.

Q. You didn't see him in New York City between the 1st and the 5th.

A. I don't think so, from what I can recollect. I might be wrong in my dates, because he might have held this letter up several days before he acknowledged receipt of the calendar. I will say I don't recollect the date at all.

167 Q. Where did you see him?

A. In our office. In Mr. Richold's private office.

Q. How did you come to see him?

A. Mr. Richold called me into the office and said "This is Mr. Curtis Brown". And I shook hands with him. He said, "Mr. Brown would like to have a calendar like the one on my desk", and I said that I had a nicer one on my desk, with a gilt edge, and that I would send it to him. Mr. Brown walked out the door and I went out into the office.

Q. Was there any other talk between you and him at that time?

A. Absolutely not.

Q. Did you hear any other talk on his part at that time between him and Mr. Richold?

A. No, sir. The office was closed off just like this one.

Q. Now, I show you letters under dates of November 1, 1920, December 6, 1920 and December 13, 1920, which bear the lead pen-

ciled notations "11-3, December 6th and December 18th and ask you if those are papers or letters which you received from the Curtis Brown Company in the regular course of the mail?

A. Yes, sir.

Q. And the lead pencil notations, I take it, are the dates on which you received them?

A. No; the dates on which we received them are stamped on them.

Q. Then what do those notations mean?

A. They indicate when they were answered.

Mr. Harris: I offer those in evidence and ask that they be marked "K 8, 9 and 10".

Mr. Corn: I object to them on the ground that they are immaterial to the issues raised on this motion.

168 Mr. Harris: I offer in evidence letters of November 3, 1920, December 7, December 17th, December 18th and December 27th, from Blum & Koch to the Curtis Brown Company, and ask that they be marked Exhibits "K 11, K 12, K 13, K 14 and K 15."

Mr. Corn: I object to each, all and every one of the exhibits just offered in evidence, on the ground that they are immaterial to the issues raised on this motion.

Q. After the occasion which you have described when you saw Curtis Brown in January, did you see Curtis Brown again, and if so, when?

A. I think he was in the office a couple of days ago.

Q. Did you have any talk with him at that time?

A. No.

Q. Other than these communications which you have produced here and offered in evidence, what communications have Blum & Koch received from the Curtis Brown Company?

A. None that I know of.

Q. Mr. Lask, it appears, does it not, from the correspondence which you have produced, that between the first day of November, 1920 and up to and including the 27th day of December, 1920, the Curtis Brown Company had cancelled the orders which they had placed with you at some time previous for spring and summer hats in 1921?

(Witness examines papers to refresh memory.)

169 Mr. Corn: I object on the ground that the witness's characterization of the correspondence is not binding on anybody and therefore the question is immaterial.

Q. Now, on December 27th, Blum & Koch asked that the whole matter be deferred and stated, "We will hold your spring order in abeyance awaiting the pleasure of a call from your Mr. Curtis Brown, who you state expects to be here some time in January." That's correct, is it not?

A. Yes, sir.

Q. And that is the condition existing on December 27th?

A. It is.

Q. At that time you didn't know whether you would ship the goods or not, or what would happen?

A. I knew we could ship them eventually.

Q. You, yourself, asked that the matter be held in abeyance at that time, didn't you?

A. Yes, sir.

Q. I call your attention to this part of the credit memorandums Exhibits K 4 and K 5. On the four sheets occurs the entry "Revision of Price," and in each case "$6.00."

A. $6.00; Yes, sir; that's correct.

Q. You made that entry?

A. We sent this letter, allowing them $6.00 a dozen, to every one of our customers. (Mr. Harris: "Exhibit K 14.") To every customer to whom we shipped goods we sent credit memorandum. These goods were put in the warehouse without any dates; they might be manufactured in August, September or October, as the case might be; then as we shipped them according to different dates—

January 1st, 15th, the 1st of February, &c., we put the dates
170 on them and these credits were issued accordingly, and when invoicing them at the original selling price, naturally the credit followed.

Q. Now, on January 26th you started the shipment of hats to the Curtis Brown Company on its spring and summer order?

Mr. Corn: Speaking, of course, of the year 1921?

A. Yes, sir.

Q. What occurred between December 27, 1920, when you wrote the Curtis Brown Company you would hold matters until you saw their Mr. Brown and January 26, when you started shipments on the order, which caused you to ship the order?

Mr. Corn: I object on the ground that the question calls not only for facts which may be within the witness's personal knowledge, but for facts which may not be within his personal knowledge. I have no objection to asking whether the witness knows anything about it, but to ask him generally what occurred, I think is an improper question.

A. Nothing that occurred directly with me.

Q. Did you invoice the goods?

A. No.

Q. Who has charge of the invoicing?

A. Invoice operators.

Q. How did they come to invoice this stuff?

A. Possibly I told them it was al- right to ship the goods.

Q. Before telling them it was all right to ship the goods, was anything said to you on the subject?

A. Possibly Mr. Richold spoke to me about it.

Q. It is possible. It is possible he didn't, too. I want to get the fact. Did he speak to you about it?

171 Mr. Corn: I want to object that something that was said by this witness to Mr. Richold or vice versa, is not evidence against the Curtis Brown Company.

(Question repeated.)

A. Well, the only conclusion is that the order was O. K'd.

Q. Did you take it on your own responsibility? What is the fact? Haven't you any recollection on the subject?

A. Positively not.

Q. How much was the total order?

A. A couple of thousand dollars.

Q. And you don't know whether they went off?

A. I am telling you plain facts; we check our credits in the months of July and August and if they are O. K'd they go without anything further.

Q. In this case there was a promise to withhold the matter?

A. Yes, sir.

Q. You usually keep your promises?

Mr. Corn: I object on the ground that the question is immaterial to the issues on this motion.

Q. Did you, either in ignorance of the letter of December 27th or because you had forgotten it, send out these goods, or did somebody tell you——

A. I explained to you it is possible Mr. Richold might have told me the order was O. K'd; otherwise, I would take it on my
172 own responsibility that there was no objection and ship the goods.

Q. You have in custody the original order have you not?

A. Yes, sir. Mr. Richold will bring them down.

Further examination waived until production of papers by Mr. Richold.

Continuation of examination:

Cross-examination.

By Mr. Corn:

Q. In your letter of December 18th, Exhibit K 15, you say, after addressing them,

"Acknowledging receipt of your favor of the 10th inst., our delay in answering was due to the fact that at the time we were considering revision of prices on our entire line &c. (I am omitting parts), we decided to make a reduction, &c."

Had they written you a letter on December 10th requesting any reduction?

A. I can't remember the dates. I can't say until I see the letter. At the time we were considering that reduction all the correspondence

of all the customers was held up about a week until we had come to some conclusion about making the reduction.

Q. I see. Well then, on December 27th, you wrote them, judging from the copy of the letter that you produce here, K 1, that you will hold the spring order in abeyance as per their request?

A. Yes.

Q. Now, you don't remember whether you dictated this letter or not?

A. No; I can't say.

Q. What is your position with Blum & Koch?

A. I am the Secretary. I have charge of most of the correspondence and of the office and certain things appertaining to purchases and I sell some goods occasionally.

173 Q. At any time between the date of this letter and this date, did you have any conversation with Curtis Brown about his orders?

A. No, sir.

Q. Now, has your concern shipped to the Curtis Company all of the goods that it had on order with you on December 27, 1920?

A. Yes.

Q. You say in your circular letter of December 17th,

"Unless you otherwise inform us by January 10th, it is absolutely understood that the order you have placed with us for spring delivery is entirely satisfactory and shipment will be made as instructed at the revised prices."

A. Yes, sir.

Q. Now, do you, of your own knowledge, know of any change in that arrangement?

Mr. Harris: I object to this upon the ground that it appears from the testimony of the witness that the only communications between the parties were in writing, and that writing is here with the exception of the letter of December 21st, and that the witness's conclusions in respect to this written letter are immaterial.

Mr. Corn: I am not asking him for his conclusions with respect to any particular letter; I am cross-examining this witness, and I ask him whether he knows of any change of arrangement with Curtis Brown Company other than outlined in this letter of December 17th?

A. No.

174 By Mr. Harris:

Q. You say you don't know of any change? Is that right?

A. Change what? Why, when you asked me before whether we held this matter in abeyance, I explained it was possible I might have been told by Mr. Richold to ship the order. On the other hand, I might have taken the initiative to ship the order.

Q. So that the answer you have just made to Counsel in respect to what took place after December 18, 1920 must be modified by

your present knowledge that your firm did, on the 27th day of December, 1920, tell the Curtis Brown Company that in accordance with its request of the 21st day of December, you would hold their spring order in abeyance awaiting the pleasure of a call from Mr. Curtis Brown?

A. Yes, sir.

Q. And the further modification that your associate, Mr. Richold, may have told you——

A. I explained that——

Q. May have told you that he had entered into an arrangement with the Curtis Brown Company?

A. Yes, sir.

Q. It is subject to those modifications?

A. Yes, sir.

By Mr. Corn:

Q. In this circular letter, your firm says that "Unless you (that means Curtis Brown) otherwise inform us by January 10th, it is understood that the order you have placed with us for spring delivery is entirely satisfactory."

A. Yes, sir.

Q. Now, you know from your records here that the letter of the 27th of December was sent forward by Blum & Koch to the Curtis Brown Company, stating that you would hold the spring order in abeyance. Now, my question is this: Of your own knowledge, do you know whether the terms as set down by you in your circular letter of December 17th have been modified in any way?

A. You mean did we write them further?

Q. I mean this: In your letter of December 17th you make a voluntary reduction. You understand that?

A. Yes, sir.

Q. And you say, "Unless you otherwise inform us by January 10th, it is understood that the order you have placed with us for spring delivery is entirely satisfactory, &c."

A. Yes, sir. As modified by us.

Q. Now, do you know, of your own knowledge, of any change in the conditions of the order as set down in your letter of December 17th?

A. No.

By Mr. Harris:

Q. Wasn't there a change in the date?

A. There was absolutely no change in the date.

LOUIS LASK.

Sworn to before me this 2 day of March, 1921.
DODGE L. MARKS,
Referee.

Notary Public, Kings County, No. 195.
Kings Co. Register's No. 1019.
New York Co. Clerk's No. 19.
New York Co. Register's No. 1171.

Commission expires March 30, 1921.

176 EXHIBIT K 1.

Dec. 27, 1920.

Copy.

Curtis-Brown Co.,
Tulsa, Okla.

GENTLEMEN:

We are in receipt of your favor of the 21st inst., and in accordance with your request, will hold your spring order in abeyance awaiting the pleasure of a call from your Mr. Curtis Brown, who you state expects to be here some time in January.

With compliments of the season, we remain
Yours truly,

BLUM & KOCH, INC.

177 EXHIBIT K 2.

Henry Koch, Pres. A. L. Richold, Vice-Pres. & Treas. Louis Lask, Sec'y.

Blum & Koch,

76-78 Madison Avenue,

New York, Jan. 26, 1921.

Sold to Curtis Brown Co.,
Tulsa, Okla.

Terms June 1st:
2 Per cent, 10 days.
Net 30 days.
No Discount after 30 Days.

With Other Goods.

Block.	Doz.	Styles.	Prices subject to change without notice.			
..	2	34	Leghorn	54	108	
..	1	40	Plain Baliluke	..	123	20

Duplicate.

We hereby guarantee that the merchandise covered by this invoice has been produced or manufactured in accordance with the Federal Child Labor Act of Sept. 1, 1916.
All Claims Must Be Made Within Five Days After Receipt of Goods.

178 EXHIBIT K 3.

Henry Koch, Pres. A. L. Richold, Vice-Pres. & Treas. Louis Lask, Sec'y.

Blum & Koch,

Incorporated.

76-78 Madison Avenue,

807 New York, Jan. 26, 1921.

Sold to Curtis Brown Co.,
Tulsa, Okla.

Terms June 1st:
6 Per Cent Discount Within 10 Days.
5 Per Cent Discount Within 30 Days.
Payable with Exchange on New York.
No Discount After 30 Days.
Subject to Draft After 30 Days.

7 Cases Cumberland Despatch C/O M. K. & T.

Block.	Doz.	Styles.	Prices subject to change without notice.				
..	1½	5	Split	72	108		
..	1½	33	Sennit	39	58	50	
..	1½	12	"	52 50	78	75	
..	1½	13	" Duplicate	51	76	50	
..	1½	14	"	51	76	50	
..	1½	19	Buckaroo	46	69		
..	1½	21	Sennit	48	72		
..	1½	24	"	49 50	74	25	
..	1½	25	Twist	51	76	50	
..	1½	29	Sennit	39	58	50	
..	1½	30	"	39	58	50	
..	1½	31	"	39	58	50	865 50

We hereby guarantee that the merchandise covered by this invoice has been produced or manufactured in accordance with the Federal Child Labor Act of Sept. 1, 1916.
All Claims Must Be Made Within Five Days After Receipt of Goods.

179 EXHIBIT K 4.

Henry Koch, Pres. A. L. Richold, Vice-Pres. & Treas. Louis Lask, Sec'y.

Blum & Koch,
Incorporated.

141 76-78 Madison Avenue,

Sold to Curtis Brown Co., Tulsa. Okla. New York, Feb. 8, 1921.

Terms:
6 Per Cent Discount within 10 Days.
5 Per Cent Discount within 30 Days.
Payable with Exchange on New York.
No Discount after 30 Days.
Subject to Draft after 30 Days.

Block.	Doz.	Styles.			
..	18	..	Revision of Price Inv. #807.	6 00	108

Credit Memo.—Duplicate.

The Merchandise Covered by This Invoice was Manufactured in Accordance with the Federal Child Labor Act of Sept. 1st, 1916.
All Claims Must Be Made Within Five Days After Receipt of Goods.

180 EXHIBIT K 4.

Henry Koch, Pres. A. L. Richold, Vice-Pres. & Treas. Louis Lask, Sec'y.

Blum & Koch,
Incorporated.

142 76-78 Madison Avenue,

Sold to Curtis Brown Co., Tulsa, Okla. New York, Feb. 8, 1921.

Terms:
2 Per Cent 10 Days.
Net 30 Days.
No Discount After 30 Days.

Block.	Doz.	Styles.	Prices subject to change without notice.		
..	3	..	Revision of Price Inv. #807.	6 00	18

Credit Memo.—Duplicate.

We hereby guarantee that the merchandise covered by this invoice has been produced or manufactured in accordance with the Federal Child Labor Act of Sept. 1, 1916.
All Claims Must Be Made Within Five Days After Receipt of Goods.

181 EXHIBIT K 4.

Henry Koch, Pres. A. L. Richold, Vice-Pres. & Treas. Louis Lask, Sec'y.

Blum & Koch,

Incorporated.

149 76-78 Madison Avenue,

Sold to Curtis Brown Co., Tulsa, Okla. New York, Feb. 2, 1921.

Terms ....
6 Per Cent Discount within 10 Days.
5 " " " " 30 Days.
Payable with Exchange on New York.
No Discount After 30 Days.
Subject to Draft After 30 Days.

Block.	Doz.	Styles.			
..	25½	..	Revision of Price. Inv. #1007.	6 00	153

Credit Memo.—Duplicate.

The Merchandise Covered by This Invoice Was Manufactured in Accordance with the Federal Child Labor Act of Sept. 1st, 1916.
All Claims Must Be Made Within Five Days After Receipt of Goods.

182 EXHIBIT K 5.

Henry Koch, Pres. A. L. Richold, Vice Pres. & Treas. Louis Lask, Sec'y.

Blum & Koch,

Incorporated.

148 76-78 Madison Avenue.

Sold to Curtis Brown Co., Tulsa, Okla. New York, Feb. 2, 1921.

Terms ....
2 per cent 10 days.
Net 30 days.
No discount after 30 days.

Block.	Doz.	Styles.	Prices subject to change without notice.
..	7½	..	Revision of price 6 00 45. Inv. #1008

Credit Memo.—Duplicate.

We hereby guarantee that the merchandise covered by this invoice has been produced or manufactured in accordance with the Federal Child Labor Act of Sept. 1, 1916.
All Claims must Be Made Within Five Days After Receipt of Goods.

183 EXHIBIT K 6.

Henry Koch, Pres. A. L. Richold, Vice Pres. & Treas. Louis Lask, Sec'y.

Blum & Koch,

Incorporated.

76-78 Madison Avenue.

1008 New York, Feb. 2, 1921.

Sold to Curtis Brown Co.,
Tulsa, Okla.

Terms June 1st.
2 per cent 10 days.
Net 30 days.
No discount after 30 days.

With Other Goods.

Block.	Doz.	Styles.	Prices subject to change without notice.			
..	1	36	Leghorn	..	54	
..	1	37	" Duplicate	..	54	
..	1½	38	Bangkok	87	130 50	
..	1½	39	"	87	130 50	
..	1	41	Plain Baliluke	..	123	
..	1½	42	"	127	190 50	682.50

We hereby guarantee that the merchandise covered by this invoice has been produced or manufactured in accordance with the Federal Child Labor Act of Sept. 1, 1916.
All Claims Must be Made Within Five Days After Receipt of Goods.

184 EXHIBIT K 7.

Henry Koch, Pres. A. L. Richold, Vice Pres. & Treas. Louis Lask, Sec'y.

Blum & Koch,

Incorporated.

76-78 Madison Avenue.

1007 New York, Feb. 2, 1921.

Sold to Curtis Brown Co.,
Tulsa, Okla.

Terms. June 1st.
6 Per Cent Discount Within 10 Days.
5 " " " " 30 "
Payable With Exchange on New York.
No Discount After 30 Days.
Subject to Draft After 30 Days.

9 Cases Penn. R. R. Co. M. K. & T.

Block.	Doz.	Styles.	Prices subject to change without notice.					
..	2	1	Split	58	50	117		
..	2	2	"	58	50	117		
..	2	3	"	58	50	117		
..	1	4	"	..	..	58	50	
..	1½	6	Split	75		112	50	
..	1	7	" Duplicate	..		120		
..	1½	11	"	52	50	78	75	
..	1½	17	Kuhla	48		72		
..	1½	18	Buckaroo	46		69		
..	1½	20	Sennit	48		72		
..	1½	22	Fancy	51		76	50	
..	1½	23	"	51		76	50	
..	1½	26	Sennit	40		60		
..	1½	27	"	40		60		
..	1½	28	"	40		60		
..	1½	32	"	39		58	50	
..	1	4	Split	..		58	50	1383 75

We hereby guarantee that the merchandise covered by this invoice has been produced or manufactured in accordance with the Federal Child Labor Act of Sept. 1, 1916.

All Claims Must Be Made Within Five Days After Receipt of Goods.

185 EXHIBIT K 8.

Curtis Brown Co.,
A Quality Shop for Men,
Tulsa, Oklahoma.

(Stamped on:) Received Nov. 1, 1920. Entd. Page .....
(Written over stamp in blue pencil:) "11/3."
(In red ink:) Tmgs. & Braid extracted.

Entered.
Extract.
Sheet.

(In red ink:) 9 [63]* Doz. 28 Blk.
7e [63]* 326 lea (or Ca)
3 Doz. 2 Bro. Taff

Blum & Koch, Inc.,
76 Madison Avenue at 28 St.,
New York.

October 30, 1920.

GENTLEMEN:

Please cancel order #104 amounting to $898.50 on April 15 1921 shipment.

On order #103 for February 1 shipment please cancel the 8th 9th and 10th items amounting to 1½ dozens each of lots 31, 31, and 32 all at $48.00 a dozen.

Also on the same order cancel the two flexible numbers items 15 and 16 of one and one-half dozens each at $52.50 each.

Kindly acknowledge receipt of this cancellation.

Yours very truly,
CURTIS BROWN COMPANY,
(Signed) CURTIS BROWN.

C. C. B. L. C.

(Blue line running through whole letter.)

(In pencil notations:)

	S—2666— (8)	Sen	209		1e	
	S—2667— (9)	"	"		1e	
	S—2668—(10)	"	"		1e	
	S—2673—(15)	R. & R.		49	1e	(In pencil:) 336
Applied 10203	2674—(16)	"	"	"	1e	24
		(In red ink:)			—	
					7e	360.00

[*Figures enclosed in brackets erased in copy.]

186 EXHIBIT K 9.

Curtis Brown Co.,
A Quality Shop for Men,
Tulsa, Oklahoma.

December 2, 1920.

(Stamped on:) Received Dec. 6, 1920. Entd. Page .....
(Over it in blue pencil:) "12/6."

Blum & Koch,
76 Madison Avenue,
New York.

GENTLEMEN:

In further reference to our straw hat orders for spring 1921 delivery.

We do not presume to for-cast the conditions as they will appear in the spring and summer season of 1921, but we do now fully and seriously realize that the buying public will not pay retail prices for straw hats, based on what we must ask for hats purchased at prices prevailing at the time these orders were placed. (In pencil:)

	Not made
If the public won't buy straws at the prices we will have to ask, we would be better off not to stock straw hats except in very small quantities. It is our only	[2674]*
alternative. We would like to know immediately what	[92]*
relief you can offer in the way of price concessions.	[93]*
Unless we can get greatly reduced prices on orders	[94]*
for spring delivery on straws we will necessarily have to	[95]*
cancel the greater portion of these orders and all of the	[96]*
higher priced numbers in their entirety.	[97]*
Kindly give this your immediate attention.	[98]*
Thanking you and anticipating your early reply.	[99]*

Yours very truly, 2700

CURTIS BROWN COMPANY,

(Signed) CURTIS BROWN.

C. C. B. L. C.

(In pencil:) 2655 to 2700.

[*Figures enclosed in brackets erased in copy.]

187 EXHIBIT K 10.

Curtis Brown Co.,

A Quality Shop for Men.

Tulsa, Oklahoma.

December 10, 1920.

(Stamped:) Ans'd ——. Received Dec. 13, 1920. En'td page —.
(Over Stamp, in blue pencil:) "12/18."
(In blue pencil:) Jan. 10.

Blum & Koch,
76 Madison Avenue,
New York.

GENTLEMEN:

We have your letter of December 6, in which you say you can not reduce prices on our order for straw hats for spring 1921. Regardless of rising costs of labor, material, etc., the public is in no mood to pay even regular prices for any commodity—much less increased prices. And by the spring of 1921 the public may not care to buy straw hats at even 50% reduction.

We are therefore cancelling our entire order with you for straws for spring delivery 1921. Our hat buyer covers the Eastern markets every thirty days, and we believe we can supply our wants in the quantities needed, anticipating only thirty-day periods.

Yours very truly,

CURTIS BROWN COMPANY.
CURTIS BROWN.

(Signed)
C. C. B. L. C.

(Blue penciled line drawn through letter.)
(In blue pencil "Await reply.)
(In red pencil "Jan. 10th.)

188 EXHIBIT K 11.

(Copy.)

Curtis-Brown Co.,
Tulsa, Olka.

Nov. 3rd, 1920.

GENTLEMEN:

We have for acknowledgement your favor of the 30th ult. and regret exceedingly to learn that you desire to cancel order #104 as well as several styles from order #103, and in accordance with your request we have countermanded order #104 in its entirety as well as 7½ dozen, consisting of 1½ dozen each styles 8, 9, 10, 15 and 18 from order #103.

Awaiting your further favors, we remain,

Yours truly,

BLUM & KOCH, INC.

189 EXHIBIT K 12—K 13.

Copy.

Curtis Brown Co.,
Tulsa, Okla.

Dec. 7, 1920.

GENTLEMEN:

We are in receipt of your favor of the 2nd inst. Contents of which we have carefully noted and which has been given our careful consideration.

In reference to your remarks, beg to state that we are aware that there is quite a downward trend in prices of various lines of merchandise, but as far as the straw hat line is concerned, we cannot see wherein there will be any change in price whatsoever.

When our line was figured, we had in view the impending general conditions, and therefore figured same on a very conservative basis as to braids and trimmings as we were very desirous of co-operating with the retailer, but condition- as they now exist regarding labor are as high as ever, and for these reasons we cannot see any possibility of a reduction in price whatever. Furthermore, wish to say that everything that goes into the manufacture of straw hats costs considerably more than last year—from the smallest item to that of the braid.

In July, when we figured our line, the braid market at that time was two to three hundred per cent higher than a year ago, and while it is true that the market has fallen in some instances as much as 40 0/0 to 50%, you can readily see that it has no effect, inasmuch as we anticipated a drop in the market, which at that time was abnormally high, and even at the present price of braid our present prices are based on as low a quotation as the braid can be purchased for today. Furthermore, the cost of the braid is only 25% of the cost of straw hats, labor being 50% of the total cost. This, with the additional cost of every item entering into the making of straw hats, is the reason for their being higher than last season.

As previously stated, we had taken everything into consideration when our line was made up, figuring that there would be a decrease in the price of various lines of merchandise. We figured everything as low as possible, but still with the advance in cost of labor, it is utterly out of the question to make up straw hats at the present time on any lower basis.

We desire to co-operate with the retailer in every respect, and are fully alive to the situation, and if for any reason there should be a decline in the price of our own line up to May 1st, 1921, we will certainly give you the benefit, as our prices are absolutely guaranteed, even though the goods are shipped.

190 With further reference to your order, would say that on October 30th you instructed us to cancel order #104 amounting to $809.50 and in addition requested cancellation from order #103—present order—7½ Dozen hats Total $360, and naturally

after receiving countermand in question we could not otherwise than assume that the balance of your order was entirely satisfactory, consequently same was put in work and the hats are now all finished and have your name on both linings and leathers. To further curtail any part of your order would now entail considerable loss, as the tips and leathers would be of no value and the cost of manufacture to a certain extent would be wasted. Such being the case, you can readily appreciate our position in the matter, and we trust you will accept the revised order in its entirety. On the other hand, if the hats are were not made and finished, we would certainly be willing to co-operate with you in every respect.

We trust the above will be entirely satisfactory, and with assurances of our best attention and co-operation at all times, and awaiting your further advice, we remain,

Yours truly,

BLUM & KOCH, INC.

191

EXHIBIT K 14.

Blum & Koch,
Incorporated,
66-78 Madison Avenue,

Curtis Brown Co.,
Tulsa, Okla.

New York, Dec. 17, 1921.

GENTLEMEN:

Realizing the existing business conditions and wishing to co-operate with the retailers, we have decided to make a general reduction on our line of Six Dollars a dozen. At this reduced price, our line will start at $33.00, thereby enabling the retailer to sell a hat of our manufacture to the consumer at $4.00, if he so desires.

We have decided to do this at a considerable loss, inasmuch as our line was figured originally on a very close margin—in fact, lower than any other line of similar quality, notwithstanding that labor costs are higher today than ever before. This revision applies to all orders placed with us this season, and if you have received any shipments from us, a credit will be mailed you shortly covering this reduction.

In making this revision, we have not lowered our qualities, and will maintain the same high standard of workmanship which has made the Blum & Koch production famous.

Unless you otherwise inform us by January 10th, it is absolutely understood that the order you have placed with us for spring delivery is entirely satisfactory, and shipment will be made as instructed at the revised prices.

We trust this action on our part will meet with your entire approval, assuring you that it is our endeavor to co-operate with you at all times, and remain

Yours truly,

BLUM & KOCH INC.

FILE NUMBER 63

BLUM & H

Order No. 103 — TERMS: As Jefor

Make for Curtis Brown Co

AND AFTER COMPLETION, UNTIL TIME OF SHIPMENT, STORE FOR A

Ship via Best way — Co m.

Remarks: Pack all bands —

(5)

Important Notice — No Countermands can in proc

BLOCK	DOZ.	BRAID	Qual.	DEEP	BRIM	EDGE	B
803	½	Light	X	5½	2¾	—	
704	1	"	"	4	2⅝	—	
797	1	"	"	4	2⅜	—	
480	1½	Baug	2X	5¼	2¾	—	
197	1½	"	"	4	2⅜	—	
~~803~~	~~1~~	~~Plain~~					
803	1	Plain Bale	4X	5½	2⅝	—	
197	1	Plain Bale	4X	4	2⅜	—	
32	1½	Plain Bale	4X	3½	2¼	—	

6
20

KOCH, Inc., 76-78 MADISON AVENUE at 28th STREET, NEW YORK

0448

M & F

2% off 10 days, NET 30 days. July 20th 192 0

Of Tulsa, Okla -

COUNT OF PURCHASER

About Feb 1st Die at as before c+.

now die at Preston

$ 3575

IS: As Jefferson

SHIPMENT, STORE OR A

c/o M.F.

Tulsa -

be accepted or changes made in this order after trimmings are printed or hats ess of manufacture. All hats must be made especially for this order.

Countermands can in pro

AND	BOW	Leather	TIP	5/8	3/4	7/8	7	1/8	1/4	3/8	1/2	5/8	3/4	PRICE	STYLE	BRIM	EDGE
4 Red	24	Jap	Julian		1	3	5	6	4	2	2	1		54 =	X 35	2 3/4	-
"	"	"	"		1	2	2	3	2	1	1			54 =	X 36	2 5/8	-
"	"	"	"		1	2	3	3	2	1				54 =	X 37	2 5/8	-
24	3	Jap	7 mel Red Side		1	3	4	5	3	1	1			87 =	X 38	2 3/4	-
"	24	"	"					-						87 =	X 39	2 3/4	-
4 Red			7 mel														
[illegible]	24	"	Silver -			2	2	3	2	2	1			12[illegible] =	X 42	2 3/4	-
"	24	"	7 mel Silver		1	2	2	3	2	1	1			123 =	X 41	2 3/4	-
4 Red	24	Jap	7 mel Silver		1	3	4	5	3	1	1			127 =	X 40	2 1/4	-

EX TRA SHEET

193

192 EXHIBIT K 15.

Dec. 18th, 1920.

Copy.

Curtis-Brown Co.,
Tulsa, Okla.

GENTLEMEN:

Acknowledging receipt of your favor of the 10th inst. our delay in answering was due to the fact that at the time we were considering revision of prices on our entire line and after mature consideration, we decided to make a reduction of $6.00 per dozen on all the hats sold and manufactured by us for the coming season, notice of the matter being sent you on the 16th inst. as per copy of enclosed letter.

In connection with the above, we might add that correspondence received from you as well as from several other customers influenced us to a great extent, as we appreciated the spirit in which you wrote us and even though it means a tremendous loss to us, we think it will be to the best interests of all concerned—at least we sincerely hope so—and that this will be the means of stabilizing the straw hat business for the coming season.

As regards your request for cancellation of your entire order, we trust that this adjustment will be entirely satisfactory and that you will allow order to stand, for as previously advised, all the hats have been made.

Awaiting your further advice, we remain.

Yours truly,

BLUM & KOCH, INC.

(Here follow reproductions of Exhibits K20, K21, K22, and K23, marked pages 193-196, inclusive.)

197 ABRAHAM L. RICHOLD, being duly sworn by the Referee, testifies as follows:

Direct examination.

By Mr. Harris:

Q. What is your full name?
A. Abraham L. Richold.
Q. And you live where?
A. 201 West 79th Street, New York City.
Q. And your business is what?
A. Straw hat manufacturer.
Q. Under what title?
A. Blum & Koch, Incorporated.
Q. And your position in the Company is what?
A. Vice President and Treasurer.
Q. How long have you been in that position?
A. Well, I have been in it since the formation of the corporation. I have been in that position for five or six years.
Q. Do you know the Curtis Brown Company?
A. Yes.
Q. How long have you known that Company?
A. I should judge about five years.
Q. Then you knew them and their predecessor, the Brown, Blazer Company?
A. Yes.
Q. And you know Curtis Brown individually, the President of the Curtis Brown Company?
A. Yes, sir.
Q. Was there a time in January when you saw him here in New York?
A. Yes.
Q. What day was that?
A. Well, it was right after the 1st of January—the first week in January.
Q. Where did you see him?
A. In my office.

198 Q. Are you familiar with the correspondence which has been produced?
A. In a general way; I don't pay much attention to the correspondence.
Q. At that time there were pending certain orders from the Curtis Brown concern to yours?
A. Yes, sir.
Q. And are these papers, Exhibits K 20, K 21, K 22 and K 23—that represents all the orders you had at that time pending undelivered?
A. Revised or cancelled; they were the orders in question.
Q. Those four sheets represent the orders? You are familiar with those?

A. Yes.

Q. And on the day that Mr. Brown come into your office there had been certain correspondence between your concern and the Curtis Brown Company relative to those orders?

A. Yes.

Q. Now, I show you Exhibits K 11, K 12, K 13, K 14, K 15 and K 1, starting with the 3d day of November, and ask you if those represent all of the communications passing between your concern between November 3d and January 1st?

A. To the best of my knowledge it is, because I am not conversant with the mail end of the business and don't keep track of the mail. In fact, I gave instructions to the girl to give me all the correspondence appertaining to the Curtis Brown case, and so far as I know this represents the correspondence.

Q. Now, I show you Exhibits K 8, K 9 and K 10, and ask you if that is, so far as you know, all the communications received by your concern from the Curtis Brown Company between the dates which I have mentioned?

A. To my knowledge, that's all so far as I know.

199 Q. Now, I call your attention to this fact: There is clearly omitted from this correspondence and missing, a letter written by the Curtis Brown Company to your concern on the 21st day of December, 1920.

A. Of course, I couldn't give any information regarding this because I would call this routine correspondence and wouldn't pay any attention to it.

Q. Do you know where the letter is?

A. I do not.

Q. Have you given any directions in respect to that letter?

A. No; the only directions I gave was to get all the correspondence appertaining to the Curtis matter.

Q. You don't know why that letter is missing?

A. I have absolutely no knowledge as to it.

Q. You had no talk with Mr. Curtis Brown or anybody else?

A. No, sir.

Q. Now, will you kindly examine this letter of December 27th, written by your concern, and state what the contents of that letter of December 21, 1920 were?

A. I couldn't tell you unless I see the letter.

By Mr. Corn: Read your reply over and maybe it will refresh your mind.

(Witness reads reply.)

A. Well, that is nothing but a routine reply to a letter.

Q. You know that it must have said this: That Curtis Brown would be here in January—he evidently would be here in January—and to hold the matter back until he came. You knew at least that he would be here in January?

A. According to that letter he would.

Q. And he was coming for the purpose of discussing that particular order.

A. I don't know. To my personal knowledge I don't re-
200 member ever having seen that letter.

Q. You have no knowledge of it?

A. Absolutely not.

Q. Who had charge of the relations between your concern and the Curtis Brown Company?

A. What relations?

Q. The sale of goods. Delivering an order when an order comes in.

A. Naturally, when the order comes in it goes to be checked up.

Q. You said in your letter that you would hold the matter until Mr. Brown came in January. Whose business was it in your firm to talk with Mr. Brown when he did come in in January?

A. My business.

Q. And you didn't know anything about this letter?

A. No; there might be dozens of them. It is our policy to hold them in abeyance. We wouldn't want any controversies or anything else. We would handle them all the same way.

Q. Between the 27th day of December, 1920 and the 26th day of January, 1921, did you see Mr. Brown other than on this occasion which you mention?

A. He was in to see me the first part of January.

Q. Just on that one occasion? That was the only time?

A. Yes, sir.

Q. And you were there?

A. I was there.

Q. What time of day was it?

A. That's pretty hard for me to tell. I should judge it was in the middle of the day. Any time that I would tell you would be guess work.

Q. Who was with you?

A. No one.

Q. Where were you?

A. In my private office in my place of business.

201 Q. Where is your place of business?

A. Twenty-eighth Street and Madison Avenue.

Q. What conversation did you have with Curtis Brown at the time he was here?

A. I looked upon it as a social visit, but to the best of my recollection I mentioned to him the fact that we had made a reduction of $6.00 a dozen which I trusted would be satisfactory to him; that we had sent out a letter to each and every one of our customers (a copy of which you have there) advising them of the fact, and that if we did not hear from him by January 10th we would take it for granted that the order was satisfactory and we would not accept cancellation. As I remember it, he did mention that so far as he knew it would be satisfactory and if we didn't hear anything further from him we could ship the goods.

Q. What further conversation did you have with him on that day?

A. That's as far as I remember. I remember something about a calendar on my desk which he admired and I promised to send him one, which I did. I don't think Mr. Brown was five minutes in my office, all told.

Q. Between December 27, 1920 and January 26, 1921, did your concern receive any communications from the Curtis Brown Company in writing?

A. Nothing, unless it is there, to my knowledge. We received no communications from him except what is there, to my knowledge.

Q. And you mean by that, so far as you know?

A. So far as I know, because, as I say, there are so many letters going in and out that I have something else to do and have somebody else to take care of that end of it, but we keep pretty close files.

Q. Have you seen Curtis Brown since that first week in
202 January, 1921?

A. No, sir.

Q. Have you had any communication with him?

A. No, sir.

Q. Or with anybody representing him?

A. No, sir.

Cross-examination.

By Mr. Corn:

Q. In your circular letter of December 17th you make a certain revision in the orders that Curtis Brown had with you.

A. That was made with everyone. It wasn't made with Curtis Brown in particular.

Q. That was practically a circular letter which was sent out to all of your customers and was voluntary on your part?

A. Absolutely.

Q. Now, when Brown called on you in the early part of January as a result of such talk as you may have had with him concerning the Curtis Brown Company orders, was there any change made in the conditions as set down by you in your circular letter of December 17th.

A. There was no change made whatever. There were no conditions in that letter except the reduction of $6 per dozen.

Q. So when you began to ship the goods to him it was in relation to that order as modified by December 17th?

A. No; in fact, there was a part cancellation of that order.

Q. Well, the cancellation of that order was the result of correspondence?

A. It was prior to the circular.

Q. When you forwarded the goods, it was in exact accordance with the original orders, minus the cancellation and plus or
203 minus the conditions laid down in your letter of December 17th, and there were no new terms arrived at at the meeting you had in January?

A. No; there were no new terms.

Q. Do you know who dictated the Blum & Koch letter of December 27th to the Curtis Brown Company?

A. The supposition is that Mr. Lask must have dictated it, although it might have been a routine letter which the stenographer herself took up.

Q. Would the fact that no initials were put at the right-hand side of the letter be an indication that the stenographer herself may have answered it?

A. We do not initial the copies. If the letter was dictated the initial would be "L. L.," but there is no initial added to the copy.

Q. The original in the possession of the Curtis Brown Company would be initialed? That would be initialed and that would be an indication as to who sent it?

A. Yes, sir.

Q. Now, in that letter you say:

"In accordance with your request, will hold your spring order in abeyance awaiting the pleasure of a call from your Mr. Curtis Brown, who you state expects to be here some time in January."

Have you now any present recollection or direct remembrance, or what is fixed in your mind generally as to what this letter of the 21st said?

A. I have no recollection. Evidently that is an answer to that letter.

Q. It is clear from your letter, you will admit, that you agreed to hold up the order until he called?

A. Yes, sir.

Q. And he did call in January and there was no change made?

A. There was no change made.

204 Q. Did he request you to make any change at this January visit?

A. No, sir.

Q. You said before you considered it a social visit. In what sense?

A. We have a great many accounts and customers come in who have absolutely no business at all, just to pay a friendly visit.

Q. Just a sort of a little "talk-fest," as it were; a talk about general conditions?

A. Yes, sir.

Q. Did he give you any order at that time?

A. No, sir.

Q. Did you do anything at all besides giving him the calendar?

A. No; that's all.

Q. You say he was only in your office five minutes?

A. About five minutes.

Q. Did he look at any merchandise or place any other orders?

A. No, sir.

Q. Was this period when he was in an in-between season?

A. It is an in-between season for us. Orders are placed in July and August. This has been an exceptional season. I hope we don't see any more like it.

Q. This cancellation that was made by him prior to December 17th you accepted without protest?

A. We accept them all without protest.

Q. So there wasn't any controversy even between you?

A. Absolutely not. If you see the correspondence, you see our answer.

Q. Just what did Brown say when he called in January about this order?

A. I spoke to him in January saying that we had made a reduction of $6 a dozen, of which we had notified him. I said I hoped that it would be satisfactory and my answer was that
205 it was up to him and if we didn't hear anything further we would assume it would be all right to ship the goods. After the tenth of January any letters we had not heard from we considered bona fide orders.

Q. And you have heard nothing further from him to the contrary?

A. Nothing to the contrary.

Q. Do you know why this letter of December 21st has been omitted from the correspondence?

A. I have no knowledge concerning it. I have been pretty busy all week and I took the papers as they were given to me.

Q. Does it make any difference to you that this has been omitted?

A. It makes no difference at all. If it would make any difference to us we wouldn't give you the answer to the letter if we didn't want to give you the letter.

Redirect.

By Mr. Harris:

Q. What is the time for a letter from here to Tulsa?

A. I should judge about three days.

Q. And you wrote him this circular letter on the 17th and sent it to him?

A. Yes.

Q. And it is perfectly evident that he wrote you on the 21st?

A. Well, it says "your letter of the 21st."

Q. And it is perfectly evident that that letter was of such a nature that your people agreed to hold the matter in abeyance until he came?

A. That's what it says there.

206 Q. And it is perfectly apparent that the Curtis Brown Company notified you that he would be here?

A. That's what the letter states.

By Mr. Corn:

Q. This circular letter, however, states that you would hold the matter until January 10th?

A. That's it.

ABRAHAM L. RICHOLD.

Sworn to before me this 2nd day of March, 1921.
DODGE L. MARKS,
Referee.

Notary Public, Kings County, No. 196.
Kings Co. Register's No. 1019.
New York Co. Clerk's No. 19.
New York Co. Register's No. 1171.
Commission expires March 30, 1921.

207 JOHN P. AHRENS, being duly sworn by the Referee, testifies as follows:

Direct examination.

By Mr. Harris:

Q. Mr. Ahrens, you live where?
A. 279 Kingston Avenue, Brooklyn, N. Y.
Q. What is your business?
A. I am a salesman.
Q. With what concern?
A. Mark Cross Company.
Q. What is Mark Cross Company?
A. Manufacturers of leather goods and gloves.
Q. I asked what they were—I meant whether a corporation or a copartnership?
A. A corporation.
Q. Are you an officer or a director of the corporation?
A. I am not.
Q. Who has charge of the office of Mark Cross Company?
A. Well Gerald Murphy is the Secretary, and he is in Boston.
Q. And who is the President?
A. Mr. Patrick Murphy.
Q. And where is he?
A. He is in Europe.
Q. Who is the Treasurer?
A. Frederick T. Murphy. He is in Europe too.
Q. Who is Vice President?
A. Frederick T. Murphy.
Q. Who is in charge of the Cross Company in New York City?
A. Miss Rundell.
Q. What is her first name?
A. Miss L. Rundell.
Q. And the place of business is located where, here?
A. 404 Fifth Avenue, New York City.
208 Q. What is Miss L. Rundell's position?
A. Just as you said, in charge of the office.
Q. And who is in charge of the business here in New York City?
A. Well, I presume she is in charge of it.
Q. To whom are you answerable in the discharge of your duties as salesman?

A. To Mr. Gerald Murphy.
Q. He is your only superior?
A. He is.
Q. And what position did you say he occupied?
A. Secretary, and he is in Boston.
Q. So that of the persons in authority, you are next under him in the corporation?
A. Yes, sir.
Q. And what is your position to Miss Rundell in the corporation?
A. I am only a salesman, as I stated before.
Q. Do you know Curtis Brown?
A. I do.
Q. And you know the Curtis Brown Company?
A. Yes.
Q. How long have you known them?
A. To my knowledge, I should say two years.
Q. Where were you during the month of January, 1921?
A. Well, I was in New York.
Q. All the month?
A. All during the month.
Q. Were you here on January 5th?
A. I was ill and away from the place of business.
Q. You were at the place on the 25th day of January, 1921?
A. Yes.
Q. At that time was your attention called to an entry or a slip containing an order signed by Curtis Brown?
A. By who? Who called my attention to it?
Q. Why any person.
A. That I cannot remember exactly.
209 Q. Well, do you remember of an occasion when a gentleman was in there and your attention was called to the matter?
A. I do, but I don't remember just what the date was.
Q. What time of month was it? The latter part of the month of January?
A. I should say, to my knowledge, about the middle part.
Q. Did you look at the entry at that time?
A. My attention was called to it, but I didn't look at the entry.
Q. By whom was your attention called to it?
A. Miss Donahoe.
Q. And did you talk with the gentleman who was there?
A. I did.
Q. Were you asked by him to give him a copy of the entry which was there?
A. I was.
Q. And what did you do?
A. I refused to give him that or to give him a copy of it.
Q. And you declined to give him any information in respect to the purchase?
A. No; I told him I wasn't there at the time and knew nothing of it, but when he requested a copy I didn't think it was in order to give it to him.

Q. Did you ever consult your attorneys about this matter?
A. Only about the subpœna. I didn't consult any attorney, but I went to Miss Rundell.
Q. You assume she did. Is that the idea?
A. I assume she did.
Q. The office files are under her jurisdiction, I take it?
A. Yes.

210 Cross-examination.

By Mr. Corn:

Q. Mr. Ahrens, you say you assume Miss Rundell consulted with attorneys. Do you know the attorneys for the Mark Cross Company?
A. Mr. Betjemann.
Q. Do you know where his office is?
A. No.
Q. Do you know his first name?
A. No; I don't know that.
Q. Is he a New York lawyer?
A. Yes.
Q. You have no personal knowledge of this transaction that took place between Mr. Curtis Brown and the Mark Cross Company?
A. I have not.
Q. You did not wait on him?
A. No.
Q. Are you a travelling salesman for that Company?
A. I am.
Q. Have you sold goods to the Curtis Brown Company.
A. I have.
Q. Where do you usually take orders from them?
A. In New York here.
Q. Then you would wait on him when he came to New York?
A. Yes.
Q. But on this occasion you did not wait on him?
A. No.
Q. Have you anything to do with the Retail Department?
A. No.
Q. So you wait on goods at wholesale?
A. I do.
Q. So if he wanted to buy goods retail, he would be waited on by somebody in the Retail Department?
A. Yes.
Q. It has been testified that there is in existence a sales slip indicating a purchase by Mr. Curtis Brown of a brief case and a bag in the Retail Department, and that that slip went to the Whole-
211 sale Department and was charged up at wholesale. Now, isn't it a fact, that if a wholesale customer, or somebody connected with wholesale, wishes to make a purchase for personal use

in the Retail Department, that you extend to him the privilege of getting it charged up as a wholesale purchase?

A. Yes; we do.

Q. Would you kindly describe that process a little more in detail?

A. When customers who are wholesale clients buy goods for their personal use they usually go to the retail store, because they have a larger selection to select from. In that instance, the retail store only allows them a courtesy discount and the charge is transferred to the Wholesale Department. The retail charge is to the wholesale.

Q. If this courtesy is extended to a person who wants to pay cash, is he allowed this courtesy discount just the same?

A. He is allowed the discount, whatever it is.

Q. In other words, they don't open any acount for him, they just charge it against his concern if he so requests?

A. If he so requests it.

Q. Is that frequently done?

A. Very often.

Q. Can you give us an idea of the size of the orders that you get wholesale from the Curtis Brown Company, from memory?

A. Well, they have extended between $2,000 and $3,000 in some instances.

Q. That is, purchases by the Curtis Brown Company in the Wholesale Department, have amounted to $2,000 or $3,000?

A. Yes.

Q. What kind of goods do you sell them?

A. Men's gloves and novelties.

212 Q. Do you sell them bags at wholesale, that you can remember?

A. That I can't vouch for.

Q. Well, the purchase of one or two bags and a brief case wouldn't be a wholesale purchase, would it?

A. To my knowledge, Mr. Brown has never bought any brief cases wholesale.

Q. And have you any recollection as to whether he bought bags at wholesale?

A. That I can't say.

Q. When wholesale purchases are made by a house of the size of Curtis Brown & Company, it would not be limited to one or two bags, would it?

A. No; probably a dozen or more.

Q. And the same is true of brief cases?

A. Yes.

Q. What line of business is the Curtis Brown Company in?

A. Men's clothing and furnishings.

Q. Have they a leather department?

A. I have never visited their store.

Q. You don't know the character of the bags that were included in this purchase that we are inquiring about?

A. No.

Redirect examination.

By Mr. Harris:

Q. Did you see this entry on the books of your concern, with reference to which you have been testifying?
A. It is quite possible I have seen it.
Q. I am not asking what is quite possible. I am asking if you did see it?
A. Possibly so.
Q. How did it read?
A. I have no knowledge of it. My attention was just called to it when this man came to make inquiries about it.
213 Q. And was the slip in Miss Donovan's hands at that time?
A. That I can't vouch for.
Q. Well, didn't she ask you if she could let Mr. Strauss see it and give him a copy?
A. She did, but she had a wholesale charge on the books. I don't know about the retail slip.
Q. And before answering, did you see what it was?
A. I just saw the charge and when he made the request I didn't think it was proper to give him that information.
Q. Have you seen Mr. Brown since?
A. No.
Q. You haven't seen him within the last two or three days here in New York?
A. No.

By Mr. Corn:

Q. Mr. Ahrens, you have nothing to do with the office, have you?
A. No.
Q. Have you ever exercised any authority at any time during your connection with the Mark Cross Company with regard to giving copies of slips or documents of the Mark Cross Company?
A. The firm wouldn't permit me to do that.

JOHN P. AHRENS.

Sworn to before me this 1st day of March, 1921.

DODGE L. MARKS,
Referee.

Notary Public, Kings County, No. 195.
Kings Co. Register's No. 1019.
New York Co. Clerk's No. 19.
New York Co. Register's No. 1171.
Commission expires March 30, 1921.

214 HELEN MARIE DONOVAN, being duly sworn by the Referee, testifies as follows:

Direct examination.

By Mr. Harris:

Q. Your full name, please?
A. Helen Marie Donovan.
Q. And you reside where?
A. 912 Brooklyn Avenue, Brooklyn.
Q. Your business is what?
A. Clerk for Mark Cross Company.
Q. And in what department?
A. Wholesale department.
Q. And in that department you have charge of doing what?
A. I have charge of the wholesale accounts.
Q. Wasn't there a time when you made an entry on the books of the Cross Company during the month of January concerning the Curtis Brown Company?

By Mr. Corn: Objected to on the ground than an entry on the books of Mark Cross Company concerning the Curtis Brown Company is incompetent as against the Curtis Brown Company.

A. Yes.
Q. When was that?
A. I don't know the exact date. The early part of January, I believe.
Q. In the early part of January?
A. I believe so.
Q. Did any paper come to you before you made that entry?

By Mr. Corn: Objected to as immaterial and not binding on the Curtis Brown Company.

A. Yes.
215 Q. The Cross concern is what—a copartnership or a corporation.
A. A corporation.
Q. You were asked to bring the paper to which I have referred, with you here?
A. Yes.
Q. And the corporation declined to let you bring the paper?
A. There was no one there in authority to let me bring it.
Q. So you have not brought it?
A. No.
Q. You have not produced it?
A. No.
Q. What was that paper?
A. A saleslip from the retail store.
Q. Of the Cross Company?
A. Yes.

Q. And what did you do upon receiving that slip?
A. I O.K.'d the slip to deliver the goods.
Q. And what was then done with the slip?
A. It goes through the regular routine of the Retail Department and sent up to Wholesale to be billed.
Q. What did that slip contain?
A. I don't know exactly. I believe it was a bag and a brief case, but I am not positive.
Q. What was the aggregate amount of the sales slip?
A. I imagine about $60—somewhere around that.
Q. And did it bear any signature?
A. Yes.
Q. What was the signature?
A. The signature of Curtis Brown.
Q. Do you know his signature?
A. Yes.
Q. And was that signature his?
A. As far as I know it was.
Q. Did it look like his?
A. Yes.
216 Q. It was your duty to pass upon that slip?
A. Yes.
Q. And how were the items upon that slip charged?
A. Why the account is in the Wholesale Department so it was charged Wholesale, but not at wholesale price.
Q. I am asking through what name?
A. It was charged to the Curtis Brown Company.
Q. Mr. Ahrens was also subpœnaed?
A. Yes.
Q. You expect he will be here?
A. Yes.

Cross-examination.

By Mr. Corn:

Q. Miss Donovan, do I understand you are employed in the Wholesale Department of Mark Cross Company?
A. Yes.
Q. And you received this slip from the Retail Department, did you?
A. Yes.
Q. Do you remember from what person in the Retail Department you received this slip?
A. No, I do not.
Q. In the ordinary course, would it come from a salesman in the Retail Department?
A. From a saleslady.
Q. That slip is used usually where a purchase is made in the Retail Department but is to be charged to Wholesale?
A. That slip is used at any purchase in the retail store. If it happens to be wholesale the slip is then transferred to wholesale.

Q. What do you mean by saying, "If it happens to be wholesale?" Do you mean if the customer is a wholesale customer, then the slip goes from the Retail to the Wholesale Department?

A. They generally buy in the retail store for their own personal use because there is a larger selection.

Q. This slip indicated a purchase at wholesale coming from the retail department, did it not?

A. Yes.

217 Q. Do you remember what the amount of the purchase was as shown by that slip?

A. No I don't.

Q. Didn't you say it was $60 just now?

A. I said around $60. That was the wholesale price. I don't take any note of retail prices.

Q. Now the slip showed that there had been a purchase made in the Retail Department of a brief case and a bag, didn't it?

A. Yes.

Q. Isn't it a fact that there were two bags and a brief case?

A. That may be; I don't remember exactly.

Q. You say it was about $60, and you know that was the wholesale price?

A. That was less the wholesale discount. When they buy in the Retail Store for personal use they don't get it at the regular wholesale price. There is just a small courtesy discount of 20%. If they want it for their company they buy in the Wholesale Department at the wholesale price.

Q. Was it this sort of a sale? This slip indicated that some concern, say Curtis Brown Company, had a charge a-count in the Wholesale Department and had charged to itself purchases that were made in the Retail Department?

A. Yes.

Q. That is what the slip indicated?

A. Yes.

Q. You say that when a firm that has a wholesale account buys in the Retail Department and wants to get a wholesale price, it is then charged through the Wholesale Department. In other words, let us assume that Curtis Brown wanted to buy this bag and brief case in the Retail Department but wanted to get a wholesale price. In order to get the benefit of the wholesale price he would have to have it charged this way, through wholesale?

A. No; he would have to come up to the sample room.

218 When they are bought in the sample room they get regular wholesale prices.

Q. The courtesy discount is given to the wholesale customer, is it? People connected with a company go into the Retail Department and make a purchase and get the benefit of this discount?

A. Yes.

Q. So that, so far as it appears from this slip in the form in which it was handled, this might have been a purchase by Curtis Brown of these goods for his own personal reasons?

A. It seems that way.

Q. Is that the way it is done at Mark Cross Company?
A. Yes; generally.
Q. How long have you been employed by the Mark Cross Company?
A. Eight years.
Q. So you are thoroughly familiar with the routine followed in transactions of this kind?
A. Yes.
Q. So there is no doubt this was a purchase in the retail department?
A. It was a purchase in the retail department.
Q. Do you know Mr. Curtis Brown personally?
A. Not that I know of.
Q. You were not present when this purchase was made?
A. No.
Q. Would this slip indicate what person in the employ of the Mark Cross Company waited on him in this transaction?
A. Yes. But they wouldn't know Mr. Brown, because it is just the retail store.
Q. Well, if the salesman wouldn't know Mr. Brown he would have to disclose the fact that he was Mr. Brown in order to get it charged up?
A. Yes.
219 Q. In this case was the purchase charged?
A. It was charged.
Q. Do you know how many years the Curtis Brown Company has been purchasing goods from the Mark Cross Company?
A. I believe about two.
Q. Have you ever known of a purchase by the Curtis Brown Company as small as this before?
A. I can't remember.
Q. What kind of a bag or bags were these that were purchased at this particular transaction?
A. I have no idea.
Q. When did you see that slip?
A. In January, when I O. K.s it. The day Mr. Brown was in.
Q. Haven't you looked at it since then?
A. After I O. K. it it goes through the regular form.
Q. Do you know Mr. Brown personally?
Q. Hasn't any bo-y spoken to you about this thing since last January?
A. Only that gentleman from Rosenberg Bros.
Q. And the gentlemen from Rosenberg Bros. talked to you about it?
A. Yes.
Q. What did he say?
A. He asked me if Mr. Brown had been in and made any purchases, and I said, "Yes; from our retail store."
Q. Do you know about this man from Rosenberg Bros.?
A. Yes.
Q. Would you recognize him?

A. I believe so.
Q. You told him it was a purchase from the retail store?
A. I told him I thought it was a personal transaction.
Q. Did you tell him what the purchase consisted of?
A. I believe I did.
220 Q. Did he ask you to make an affidavit for him?
A. No; he asked me to get a copy of the slips.
Q. Well he has sworn in this proceeding that he requested you to make an affidavit of the facts. Did he ever make such a request?
A. Not that I know of.
Q. And he says that after asking you you declined to make an affidavit. Is that true?
A. Positively no. He asked for a copy of the slips and a copy of the bills.
Q. You haven't brought any records with you at all have you?
A. No, sir.

Redirect examination.

By Mr. Harris:

Q. Mr. Ahrens was there at the same time, was he not?
A. I believe Mr. Ahrens was ill.
Q. At the time Mr. Strauss was in?
A. Yes, sir.
Q. Mr. Strauss asked for a statement in respect to this matter, did he not? The information which you and Mr. Ahrens gave him on that occasion?
Q. He asked for a copy of the bill, which we refused him.
Q. Mr. Ahrens or you replied that you would have to get permission first?
A. I believe Mr. Ahrens did.
Q. And you would let him know later?
A. I don't remember.
Q. In any event, you were instructed not to give him any information, were you not?
A. No.
Q. And you talked with Mr. Ahrens about giving this information to Mr. Strauss, and Mr. Ahrens came over and both you and Mr. Ahrens took the matter up with Mr. Strauss, and the sum and substance of the matter was that you and Mr. Ahrens would not give him anything.
A. He wanted a copy of the bills. I didn't say anything.
221 Q. You were both there; and you got Mr. Ahrens to say whether you could give him a copy of them?
A. No; I didn't.
Q. At any rate, Mr. Ahrens was the one who gave this information?
A. Yes.
Q. What is Mr. Ahren's position; is he your superior?
A. No.

Q. Why did you go to him?
A. Why, he knows Mr. Brown and it was his account. He covers that territory.

By Mr. Corn:

—. Mr. Harris used the word "statement" and you used the word "slip". Were you asked by Mr. Strauss to give a statement?
A. No; not to my knowledge.
Q. You were only asked for a copy of the slip?
A. Yes, sir.
Q. Did you say you wouldn't give him any?
A. No.
Q. Did you hear Mr. Ahrens say that he or the Mark Cross Company wouldn't give him any?
A. No.

HELEN M. DONOVAN.

Sworn to before me this 28th day of February, 1921.
DODGE L. MARKS,
Referee.

Notary Public, Kings County, No. 195.
Kings Co. Register No. 1019.
New York Co. Clerk's No. 19.
New York Co. Register's No. 1171.
Commission expires March 30, 1921.

Endorsed: Supreme Court, Monroe County. Rosenberg Bros. & Company, Inc., plaintiff, against Curtis Brown Company, defendant. Depositions. Werner & Harris, attorneys for plaintiff, 619 Union Trust Bldg., Rochester, N. Y. Filed Apr. 26, 1921. Harris S. Williams, clerk.

222 STATE OF OKLAHOMA,
County of Tulsa, ss:

I, O. D. Lawson, County Clerk, within and for said county, do hereby certify that J. H. C. Hopkins, whose name is subscribed to the within certificate of proof or acknowledgment, was at the time of taking proof of acknowledgment, a Notary Public within and for said County, residing therein, and duly authorized by the laws of said state to take the same and to take the proof and acknowledgment of deeds. And I further certify that I am well acquainted with his handwriting and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed my seal of Office at Tulsa, Oklahoma, in said county this 25th day of March 1921.

O. D. LAWSON,
County Clerk,
By E. W. CLARK,
Deputy.

223 STATE OF OKLAHOMA,
County of Tulsa, ss:

I, O. D. Lawson, County Clerk, within and for said county do hereby certify that J. H. C. Hopkins whose name is subscribed to the within certificate of proof or acknowledgment, was at the time of taking proof or acknowledgment a Notary Public within and for said County, residing therein, and duly authorized by the laws of said state to take the same and to take the proof and acknowledgment of deeds. And I further certify that I am well acquainted with his handwriting and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed my seal of Office at Tulsa, Oklahoma, in said County, this 25th day of March 1921.

O. D. LAWSON,
County Clerk,
By E. W. CLARK,
Deputy.

224 STATE OF OKLAHOMA,
County of Tulsa, ss:

I, O. D. Lawson, County Clerk, within and for said county do hereby certify that J. H. C. Hopkins whose name is subscribed to the within certificate of proof or acknowledgment, was at the time of taking proof or acknowledgment a Notary Public within and for said County, residing therein, and duly authorized by the laws of said state to take the same and to take the proof and acknowledgment of deeds. And I further certify that I am well acquainted with his handwriting and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed my seal of Office at Tulsa, Oklahoma, in said County, this 25th day of March 1921.

O. D. LAWSON,
County Clerk,
By E. W. CLARK,
Deputy.

225 In the Supreme Court of the State of New York, Monroe County.

ROSENBERG BROS. & CO., INC., Plaintiff,

vs.

CURTIS-BROWN COMPANY, Defendant.

Affidavit on Motion to Quash Service.

STATE OF OKLAHOMA,
Tulsa County, ss:

Curtis Brown, being duly sworn on his oath says: That he is president of the defendant corporation and has been such officer at all times herein mentioned; that he is the same person who made an affidavit herein, verified on the 15th day of January 1921. That he has read the opposing affidavit of Maurice Strauss verified on the 2nd day of February 1921, and filed in this cause; and the opposing affidavit of Edward Rosenberg, verified the 4th day of February 1921; and the opposing affidavit of A. Ivan Brickner, verified the 21 day of January 1921; and that he has also read the depositions made before the Hon. Dodge L. Marks, esquire, referee, given by E. W. Bill, James G. Whitelaw, St. Clair Burns, Robert A. Holmes, Louis Lask, Abraham L. Richold, John P. Ahrens and Helen Marie Donovan, sworn to before said referee.

As stated in my previous affidavit, I left Tulsa in the latter part of December 1920 for the purpose of a business trip to Chicago and Milwaukee, and that at that time had no thought of going to New York, and it had not been in any manner determined to, at
226 that time, make any purchase in New York, nor was it the intention of the defendant corporation, or its officers to make any purchases at that season of the year in New York, or to transact any business there, and it had not been considered, either by myself or by the other corporate officers that any business should be transacted, or ought to be transacted in New York, or any purchase there made, and it, at that time, had no occasion to make any purchases in New York, and when I left Tulsa, I had made no arrangements for a trip to New York, nor was I authorized to, or directed by the corporation, or any of its officers, or its Board of Directors, or any other person connected therewith to go to the City of New York, or to attend to any business there, but it had been arranged by the corporation and myself, that I should attend to some business for the defendant corporation, both at Chicago, and Milwaukee, and it was my intention so to do.

While I was in Chicago on said business trip for the corporation, Mr. Seidenbach called me to New York over the long distance phone to come down and spend New Year's with him in New York City, for our mutual pleasure, and I made the arrangement with him so to do, and went to New York solely for the purpose of personal pleas-

ure, and without any intent of there making any purchase for the corporation, or doing anything for the corporation, or in connection with its business, and therefore the things which I did in New York, and which are hereinafter more specifically referred to, I did on my own volition, and without any special authority from the Company, and without notifying the company, or any of its officers, or directors, in fact in contravention of the determination theretofore made by the corporation that the purchase for the season of 1921, so far as they were to be made in New York, should be made at a later date, and what I did was gratuitous on my part, and not in the
227 service or interest of the company, except in so far as the things which I did were adopted by the corporation in Tulsa, and I make this explanation in connection with and concerning the statements contained in my said affidavit of January 15th 1921; and it is intended therewith to be a complete statement.

In as much as I was in New York for my own personal purposes, I did not recognize, nor do I now recognize, or acknowledge that I was there for the purpose of, or on the business of the defendant company, but as I have been merchandising practically all of my life, and New York City is practically eighteen hundred miles from Tulsa, it is my custom to keep in touch with my acquaintances of the business world, and this is true whether my visit is to New York, or any other market I am accustomed to visit all of the concerns with whom I have a business acquaintance, and on such visits and calls I discuss trade conditions, or matters that are of mutual interest to business men, and to persons engaged in merchandising, particularly in the lines carried by the defendant company, and through these visits, and extended business transactions, I have established a great personal regard for many of the representatives of the concerns with whom the defendant corporation does business, and they are accustomed to extend me a warm welcome, and many personal courtesies, whether I am on a business trip for the corporation, or simply drop in to meet them, and as it is my custom to make such calls, and visits upon the representatives of the concerns with whom I transact business, when I have time, and I did so have time at the time I was in New York in the early part of January, and served with the process in this cause, I did not then consider, nor do I now consider that I was there in any way upon the business of the defendant company.

But I shall now take up in detail various matters claimed by the plaintiff to constitute the doing of business for the corporation, while in New York, and to have converted my pleasure trip into a business trip for the corporation.

228 With reference to the purchase made by the company of Marks Cross & Company, I have only to say:

That while in New York and at the time mentioned in the affidavits of John P. Ahrens and Helen Marie Donovan, it occurred to me to buy a purse for my wife, and to make a present of a leather brief case to Mr. Siedenbach. These were designed and purchased purely as presents personal from myself. But as it is the universal custom among wholesalers to give the representatives of retail concerns a discount, I went into the retail department of Marks Cross

& Co., and there made my selections and after so doing announced who I was, and asked that the bill be sent to the wholesale department, and charged to Curtis Brown Company, which defendant company had an account with the said Marks Cross & Co. My request was complied with, and the goods were charged to the defendant corporation, and were charged to me by the defendant corporation, I simply having used the name of the defendant corporation to obtain a customary courtesy discount. The Brief-Case was, at once delivered to Mr. Siedenbach in New York City, as my personal present to him, and the purse was by me delivered to my wife when I returned to Tulsa. The defendant corporation having nothing to do with the matter, other than that I used its name to obtain the discount which is, so far as I know, universal in the trade. I did not on this occasion even go to the wholesale department of the Marks Cross & Company, but simply requested that the bill be sent to that department. This was the only way in which I could get the benefit of the customary courtesy discount. The purchase was not made for the defendant company, nor intended for the defendant company, nor made by the defendant company.

In this connection, I may add that the purchase made by the defendant from the Marks Cross & Company, are wholesale purchases, in large quantities for re-sale at profit to the retail trade.

229 I was not at Marks Cross & Company for the business of the defendant, and the depositions of Mr. Ahrens and Miss Donovan state practically the occurrence as it took place. I did not represent the defendant, but simply represented to Marks Cross & Company, who I was for the purpose of the customary discount, when I am making purchases for the defendant company, of Marks-Cross & Company, my dealings are with the wholesale department, and I there inspect stock or samples and make my selections and order in quantities.

With reference to my call on Blum & Koch, I desire to say that I am well acquainted with Mr. Lask, and made a social call upon him, expecting to have a chat upon matters of interest to the trade, and such as would interest men engaged in our lines of merchandise, and who had been on a familiar and friendly footing. While in his office I saw there an ornamental calendar, which attracted my attention, and I asked for one, which they later mailed to me. I did not talk about any business between Blum & Koch, and the defendant company with Mr. Lask, and did not go there for that purpose. It is true that Blum & Koch had sent out, about the middle of December, a circular letter to the effect that unless otherwise informed they would assume that their revision of the price on various orders placed with them was satisfactory. The defendant company received one of these circulars and as a result at the limit stated in that circular letter, to wit: January 10th the revision of prices became effective, but I did not discuss that matter with Mr. Lask on the occasion of my call, the early part of January. It may be that Mr. Richold mentioned to me the reductions that had been made, and that I responded that it was satisfactory. I have no recollection with reference to such a matter, and do not wish to be placed in a

position of making any contradiction of that, because not being there for any other, than a social purpose, if my attention was called to it, it was incidental, and without consideration on my part,
230 or without sufficient attention being given to it on my part to fix the matter in my memory. I was only in the place approximately five months, and did not go in the sample room, did not discuss purchases, made no purchases, and was only paying my respects to Mr. Lask and Mr. Richold.

With reference to my visit to Bill & Caldwell, I desire to state, I am and have been for a number of years very friendly with Mr. Hazelton, one of their salesman from whom the defendant corporation has purchased goods at Tulsa. Mr. Hazelton had been ill and had missed a usual trip for Bill & Caldwell to the defendant company, and I went into their place of business to inquire about him, and as stated in the affidavit of Mr. Bill, I talked about Mr. Hazelton, and stated that I was not on a buying trip. I first met Mr. Whitelaw, and talked with him, and he called Mr. Bill into the conversation, and after I had been talking for perhaps half an hour in a social and general way without any reference to making any purchases at that time, other than my statement, that I was not there to buy goods, and without any reference to transacting any business of any character for the defendant company, and when I was about to leave, Mr. Bill brought up the matter of a great bargain in hats. He praised it so strongly and made the purchase seem so desirable that I allowed them to make a memorandum of selections, which was confined by the defendant company two days after I left New York, by a written confirmation of the memorandum as an order, for the goods. The purchase seemed so tempting at the time that I determined not to lose the opportunity to purchase if upon return the defendant company should conclude to confirm, and that confirmation was made but not made until I reached Tulsa.

As to my call upon Crofut & Knapp. I made a call there, because I had leisure to do so, and to have a talk with Mr. Holmes. The business between Crofut & Knapp and the defendant com-
231 pany had been terminated, and the defendant company had decided not to transact any further business with Crofut & Knapp, but I desired to keep personal friendly relations with Mr. Holmes, and to personally discuss with him the reason for the action taken, which I, and the defendant corporation regarded as a closed incident. After talking with Mr. Holmes for perhaps half an hour, Mr. Burns took part in the conversation and shortly mentioned the so-called "floor hats," which are hats which the trade expect to get very cheaply. Mr. Burns offered these at a very low price, and I took the matter of the goods and price under consideration, but did not at that time know whether the defendant company needed that particular merchandise. I did not see the goods as they were in the factory. After my return to Tulsa, the matter of the purchase of these hats was taken up with the defendant company, and a confirmation sent directing the shipment, but this confirmation was rather a proposition, in that it did not correspond to the terms as submitted by Mr. Burns. The result was a rejection of the order by

Mr. Burns, and a final confirmation sent from Tulsa by the defendant company some two weeks after my visit to New York. The account of the transaction given by Mr. Burns is substantially correct. I did not go to Crofut & Knapp to buy goods or to do anything on behalf of the defendant company, and did not look at, or see any goods while there, or any samples, but I was only there for the purpose of a visit to Mr. Holmes, and to keep personally friendly relations with him, and explain personally my position as to what had been done by the defendant corporation. There was no contract entered into between Crofut & Knapp and the defendant corporation at the time I was there, but that was done some two weeks later, and on account of report I made after reaching Tulsa, as to what might be done.

I did not go to New York for the purpose of making a call on Mr. Holmes or Crofut & Knapp, or on an other business concern.

232 With reference to the allegations of the affidavit of Mr. Strauss, I am advised by my counsel that the merits of this controversy should not be gone into, and that the defendant has a good defense to plaintiff's action, and that it is unnecessary to controvert Mr. Strauss's conclusions.

It is true that I had, on behalf of Brown-Blazer Company, had dealings with Rosenberg Bros. through Mr. Strauss and that I had on behalf of the defendant, dealings with the plaintiff through Mr. Strauss, and it is true that the arrangements were made that Brown-Blazer, and afterwards, the Curtis Brown Company should handle the Rosenberg line of goods in Tulsa, and it is true that by the efforts of these two concerns as a selling agency, the line of goods of the plaintiff, had been made popular in Tulsa, and introduced to public attention, and demand. There had never been any agreement either between Brown-Blazer Company, and the plaintiff, or between the defendant, and plaintiff, as to any quantity of goods to be ordered or sold, or as to any other matters, excepting that these concerns consecutively would have the exclusive sale of the Fashion Park line of clothes, and as they might order the same. It has been largely through my efforts that the outlet for the goods has been made, of plaintiff, in Tulsa, and the defendant company has spent $10,000.00 or $12,000.00 in advertising the Fashion Park Clothes, in Tulsa, without any assistance whatever from the plaintiffs, and an extensive trade had been built up for their line, and it is sufficient, I am advised for me to state here that the defendant has a perfectly good defense in this cause. I have been personally friendly with Mr. Brickner and it was on account of such friendship that I called upon him on the morning of January 4th, while here on my pleasure trip, but not withstanding that my call was one of personal courtesy, the plaintiffs saw fit to take advantage of the opportunity to make a service of summons, although Mr. Brickner and the plaintiff company must have known, at the time, that I was only in New

233 York for my own purpose, and on a pleasure trip. When I am in New York on a purchasing trip the early part of the year I buy goods amounting to many thousands of dollars. For instance in the early part of 1920, the defendants purchased in

New York about $16,000.00; and its purchases in the early part of 1919 amounted to about $22,000.00; and in the early part of 1918, to about $18,000.00, and when I am in New York representing the defendant or for the purchase of goods, my trips are extended and I visit some twenty to forty concerns, and make extensive examinations of merchandise, and have a buying requisition, and plans all laid for purchase as to the class, and kind of goods and concerns which have to be called upon, and price investigations made. Upon the occasion of this trip to New York, when I was served with process in this cause I was only in the city two and one-half business days, while when I am there representing the defendant company, and on a buying trip, I am customarily there at the time of spring buying, which is usually done along the latter part of January, and remain from ten to twenty days, investigating stocks and prices, and with full memorandum and data as to stock on hand and merchandise to be bought, so that I may act intelligently for the defendant company.

I specifically deny that I said to Mr. Brickner as stated in the latter part of his affidavit that I had contemplated stopping off at Rochester on my way to New York, to see Mr. Rosenberg, but that I had so much business to do here that I did not have time.

The following is the substance of my conversation with Mr. Brickner, at the time I was served with summons in this cause:

234 After our mutual greetings, Mr. Brickner asked, "What brings you to New York so early in the year?" I replied that I had come down to celebrate the New Year with my friend, Leslie Seidenbach, as I had worked hard during November and December, having had no vacation since last summer. Mr. Brickner asked how my business was getting along, and asked about the health of my brother whom he was well acquainted with, and I told him that my business was better than we expected, and that my brother sent him his regards. Mr. Brickner asked if I had stopped at Rochester on my way to New York, and I told him "No", that my trip to New York was unexpected, as I intended when leaving home, only to go to Chicago and Milwaukee, and that I would have stopped in Rochester if I had any business there, but I was not on my regular buying trip, as we had not yet invoiced our stock, and I did not know at that time what goods we had on hand, and naturally was unprepared to buy; and that any way I had come to New York by the Pennsylvania, which does not go through Rochester. Mr. Brickner then said that if I wanted a real bargain in neckwear he knew where I could get some excellent values. I again told him that I was not open for any goods by which I meant that we did not consider any merchandise at that time, as I could not buy any goods without first knowing our stock on hand, and our requirements, which, on a New York buying trip is always planned in advance by written instructions by the Board of Directors of the defendant corporation. Mr. Brickner then asked if Rosenberg Bros. and Company, had sued me. I thought he was joking; just then an office boy entered the room and asked if I was Curtis Brown and I said, "Yes sir". He then handed me a summons. I read it and

said to Mr. Brickner, "I came up here Brick just to visit you, because I have always like- you as a friend, and for Rosenberg Bros. to serve me in this manner, at this time, is the least thing I would expect of them. I am not sneaking around New York, and
235 I would have regarded Rosenberg Bros. better than to take advantage of our friendship to serve me in this manner." I then asked if any of the officers of Rosenberg Bros. & Co., were in the other part of their New York Officer. Mr. Brickner said they were not there. That a girl employed had instructions to have me served in the event I happened to come. I told this young woman about the same as I did Brickner, in Brickner's presence. That I was surprised that a concern like Rosenberg's would serve me in such a manner. I deny that I told Brickner that I had any business to transact in New York at that time.

I was not at the time of the service of summons in this cause, in New York, for any purpose of the defendant corporation, and none of the officers of the corporation knew that I was there. Further, affiant sayeth not.

CURTIS BROWN.

Subscribed and sworn to before me this 15th day of March 1921.

[Seal of J. H. C. Hopkins, Notary Public, Tulsa Co., Okla.]

J. H. C. HOPKINS,
Notary Public.

My commission expires July 18, 1922.

236 In the Supreme Court of the State of New York, County of Monroe.

ROSENBERG BROS. & CO., INC., Plaintiff,

vs.

CURTIS BROWN COMPANY, Defendant.

Affidavit on Motion to Quash Service.

STATE OF OKLAHOMA,
Tulsa County, ss:

Arthur A. Brown, of lawful age, being duly sworn, on his oath says that he is Vice-president of the Curtis Brown Company, a corporation, defendant in the above entitled action; that he is familiar with the circumstances of Curtis Brown's going to Chicago and Milwaukee late in December 1920, on business for the Curtis Brown Company. Affiant further says that it was not contemplated by the corporation, nor the officers thereof, that the said Curtis Brown should go to New York on said trip, or until several weeks after the first of January. That it is the practice and has been for some years the practice, of the defendant corporation, to have a representative go to New York to purchase goods in the latter part of January, or

in February for the coming season; and that at such times, it has been the practice of the said defendant company to take an account of stock before such representative went to New York, and to determine what goods were on hand, and the nature and extent of purchases to be made, and neither of these things had been done
237 prior to Mr. Curtis Brown's departure for Chicago and Milwaukee, and it was not anticipated, or known to the officers of the corporation that Mr. Brown was going to New York, or that he had gone there until after his return, and he had not been authorized by the defendant company to make any purchases or transact any business for it in New York, and the officers and directors of the corporation had not contemplated the transaction of any business, or the making of any purchases in New York at that time, or until after it had been determined by the corporate officers, what goods would be needed, and the extent of purchases, as well as the nature of purchases to be made, neither of which had been done, nor was done in 1921, until after the return of Curtis Brown from New York City, in January 1921, and said corporation neither by its officers, nor directors had in any manner authorized or directed the trip of said Curtis Brown to New York in the early part of January 1921, and it was only after his return to the city of Tulsa, after the 5th day of January 1921, that the defendant corporation took up the matter of closing the deal, and completing the purchases, and confirming the tentative selections of goods which Curtis Brown had made in New York. No buying instructions had been given as was the custom when any representative of the corporation went to New York to make purchases and no lists had been prepared, nor account of stock taken for the purpose of determining what purchase should be made for the coming season, and Curtis Brown's presence in New York City was wholly on his own initiative, and without authority or discretion or consent of the corporation, or its officers, it being the custom and the practice of said corporation to determine by its directors and officers in the city of Tulsa, the condition of stock, the extent of purchases to be
238 made, and the nature of such purchases before its representative went to New York to transact any business for it, and such buyer is furnished with instructions and memorandum before his departure as to the requirements of the business for use in making purchases. None of these things were done prior to, or in connection with the trip of said Curtis Brown to New York.

The confirmation of the tentative selections made by Curtis Brown, as mentioned in his affidavit herein, was made after his return to Tulsa from New York City, and after it was determined by the officers of the Company at their place of business that the goods could be used. Further affiant saveth not.

ARTHUR A. BROWN.

Subscribed and sworn to before me this 15th day of March 1921.

[Seal of J. H. C. Hopkins, Notary Public, Tulsa Co., Okla.]

J. H. C. HOPKINS,
Notary Public.

My commission expires July 18, 1922.

239 In the Supreme Court of the State of New York, Monroe County.

ROSENBERG BROS. & CO., INC., Plaintiff,

vs.

CURTIS BROWN COMPANY, Defendant.

Affidavit on Motion to Quash Service.

STATE OF OKLAHOMA,
Tulsa County, ss:

Claude Shelton, of lawful age being duly sworn, on his oath says that he is Secretary of the Curtis Brown Company, a corporation, defendant in the above entitled action, and has been such secretary at all times herein mentioned. That he is familiar with the facts and circumstances of a trip taken by Curtis Brown to Chicago, and Milwaukee on behalf of the Curtis Brown Company, the latter part of December 1920, and affiant knows that it was not contemplated by the corporation, and its officers that said Curtis Brown should go to New York; and affiant knows that none of the preliminary things had been done which was the practice of said corporation to have done before sending a representative to New York to purchase goods; that it was the custom before sending a buyer to New York market to take an account of stock, determine class and quantity of goods to be purchased, and none of these things had been done prior to the said trip of the said Curtis Brown.

240 Upon the return of said Curtis Brown after his said trip, it was first known to affiant, who is active in the affairs of said corporation, that said Curtis Brown had been to New York City, and it was then first brought to the attention of the corporation that certain tentative selections of goods had been made by Curtis Brown, as mentioned in his affidavit made this day, and it was then determined to make the purchase, and confirmations were sent accordingly in the one case, and final confirmation in the other, only after further communication.

No authority had been given to Curtis Brown to transact any business in New York for the corporation before his going there, and the matter of his going there had not been considered except that it was determined that he, or some representative of the company should go to New York the latter part of January, after full consideration had been given by the corporate officers to the question of purchases to be made for the coming season.

Whatever Curtis Brown did in New York in the early part of January 1921, was done on his own initiative, without direction, consideration, or authority from the corporation, or its board of directors, or managing officers, and naturally without the knowledge of any of them, except himself. Further affiant saveth not.

CLAUDE SHELTON.

Subscribed and sworn to before me this 15th day of March 1921.

[Seal of J. H. C. Hopkins, Notary Public, Tulsa Co., Okla.]

J. H. C. HOPKINS,
Notary Public.

My commission expires July 18, 1922.

241 [Endorsed:] Civ. 2023. In the Supreme Court of the State of New York, County of Monroe. Rosenberg Bros. & Co., Inc., Plaintiff, vs. Curtis Brown Company, Defendant. Affidavits in Support of Motion. Siegel & Corn, Attorneys for Defendant, 51 Chambers Street, Borough of Manhattan, New York, N. Y. Filed Apr. 26, 1921. Harris S. Williams, Clerk.

242 United States District Court, Western District of New York.

ROSENBERG BROTHERS & COMPANY, INC., Plaintiff,

vs.

CURTIS-BROWN COMPANY, Defendant.

Please Take Notice; that annexed hereto is a true copy of a petition for removal and undertaking thereon in this cause, the original whereof was duly filed in the office of the Clerk of the County of Monroe on the 24th day of March, 1921, and an exemplified copy of which together with the record of this cause as on file on March 24th, 1921, was duly filed in the office of the Clerk of the said District Court of the United States for the Western District of New York, on the 26th day of March, 1921.

Dated, March 26th, 1921.

Yours etc.,

SIEGEL & CORN,
Attorneys for Defendant, (appearing specially only for the purpose of removing this cause to the said District Court, and specially only for the purpose of moving to set aside the service of the summons herein.)

51 Chambers Street, Borough of Manhattan, City of New York, N. Y.

To: Messrs. Werner & Harris, Attorneys for Plaintiff, Rochester, N. Y.

243 Supreme Court of the State of New York, County of Monroe.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

To the Honorable the Supreme Court of the State of New York:

The petition of the above named defendant respectfully shows:

1. That your petitioner appears herein specially, and for the sole purpose of removing this cause to the United States District Court for the Western District of New York, and specially, also, to move to set aside the attempted service of the summons herein, and for no other purposes.

2. That it is the defendant in the above entitled action so appearing specially.

3. That the summons herein, or a copy thereof, was handed to Curtis Brown, the president of the defendant, while temporarily in the State of New York, on the 3rd day of January, 1921; that no complaint was annexed to said summons, nor has any complaint been served herein, and, as this petitioner is informed and verily believes, no complaint has been filed herein.

4. That the matter in dispute between the parties herein exceeds, exclusive of interests and exclusive of costs, the sum of Three thousand ($3,000) Dollars.

5. That the said Rosenberg Bros. & Company, Inc., the
244 plaintiff herein, was, before and at the time of the attempted beginning of this action and the attempted service of the summons herein, and since then has been and now is a corporation incorporated, organized and existing under and by virtue of the laws of the State of New York, and was, at all of said times, and is a resident and a citizen of and has its principal place of business and is domiciled for all purposes within the State of New York.

6. That the petitioner herein, the Curtis Brown Company, named as defendant herein, was, before and at the time of the said attempted service of said summons, as aforesaid, and at the time of the attempted beginning of this action, and at all times since, has been and now is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oklahoma, and was, at all of said times, and is a citizen and resident of and domiciled within the State of Oklahoma, and has its principal office therein, and is not a citizen of and is not a resident of the State of New York and never has been, nor has it ever been nor is it now domiciled within the State of New York, nor authorized, in any manner, to engage in business in the State of New York, and never has been and is not engaged in business in the State of New York, and has no property

within the State of New York, and is wholly a non-resident of the State of New York, and always has been such non-resident.

7. That the said action above captioned, so brought by the plaintiff, is still undetermined and is solely between citizens of the United States residing in different states, and does not arise under
245 the act relating to the liability of common carriers by railroads to their employees, or any amendment thereof.

8. That the said plaintiff and the defendant are actually interested in the controversy herein, and same is a controversy wholly between citizens of different states, and can be fully determined as between them.

9. That, as your petitioner is informed and verily believes, the action is brought to recover for alleged breach of contract for failure to accept merchandise, and that the defendant denies any liability in relation thereto, and controverts the claims made by the plaintiff with respect thereto against the defendant.

10. That the time within which the defendant herein is required, by the laws of the State of New York and the rules of practice of this honorable court, to answer or plead to the complaint of the plaintiff, has not expired, and the defendant, this petitioner, has appeared herein specially only for the sole purposes of moving to set aside the attempted or alleged service of the summons herein, and for the purposes of removing this cause to the United States District Court for the Western District of New York, and does not waive its right to contest the alleged service of the summons, and intends to contest said service in the said United States District Court for the Western District of New York, and desires now to remove said action from your honorable court to the District Court of the United States for the Western District of New York aforesaid, according to the provisions of the Act of Congress of the United States, in that behalf, made and provided.

246 11. And your petitioner so appearing specially and for said sole purposes herein, files and offers herein a bond with good and sufficient surety, conditioned as required by the act of Congress in that behalf made and provided.

12. And on filing this petition and bond, and on instituting and carrying through the other provisions required for removing this cause to the United States District Court for the Western District of New York, the defendant does not waive, expressly or otherwise, any objection whatsoever to the jurisdiction or to the summons and process or sufficiency thereof, or as to the sufficiency of the alleged attempted service of the summons above set forth.

13. And your petitioner, appearing specially, prays that said bond may be accepted as good and sufficient, and that this honorable court will make its orders for and will cause the removal of said cause to the District Court of the United States for the Western District of New York, in which district this action is pending, and cause the

record herein to be removed from this court to said district court, and prays that no further proceedings may be had in this cause in this court.

And your petitioner will ever pray.

Dated, New York, March 21, 1921.

CURTIS BROWN COMPANY,
Petitioner.

247 CITY, COUNTY AND STATE OF NEW YORK, *ss:*

Jacob H. Corn being duly sworn deposes and says that he is one of the attorneys for Curtis Brown Company, the above-named petitioner, and the defendant in the within action; that he has read the foregoing petition and knows the contents thereof and same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

That the reason why this verification is not made by defendant is that it is a corporation organized under the laws of the State of Oklahoma, and deponent is its attorney; and that the source of deponent's information and the grounds of his belief as to all matters not stated in said petition as upon his personal knowledge, is information acquired by him in the course of consultations with the President of the petitioner and examination of correspondence between the petitioner and plaintiff. And your deponent further says that this verification is made in pursuance of a special appearance for the purpose of moving to set aside the service of the summons herein and for the purpose of causing the removal of this case to the United States District Court for the Western District of New York and for no other purpose.

JACOB H. CORN.

Sworn to before me this 23rd day of March, 1921.

LILLIAN M. DEASE,
Notary Public, Kings Co.

Cert. filed N. Y. Co. 442.

248 [Endorsed:] Supreme Court, Monroe County. Rosenberg Bros & Company, Plaintiff, against Curtis Brown Company, Defendant. Petition. Siegel & Corn, Attorneys for Petitioner, 51 Chambers Street, Borough of Manhattan, New York, N. Y. Appearing specially for the purpose of moving to set aside the service of the summons, and to remove this cause to the United States Court. Filed Mar. 24, 1921, Monroe County Clerk's Office.

249 Know All Men by These Presents:

That the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar street, Borough of Manhattan in the City of New York, and State of New York, is held and firmly bound unto Rosenberg Bros. & Company,

Inc., in the penal sum of Five Hundred ($500.00) Dollars, for the payment whereof well and truly to be made unto the said Rosenberg Bros. & Company, Inc., heirs, representatives and assigns, it binds itself, its representatives, successors and assigns, firmly by these presents.

Upon these conditions: Curtis Brown Company having petitioned the Supreme Court of the State of New York, held in and for the County of Monroe for the removal of a certain cause therein pending, wherein the said Rosenberg Bros. & Company, Inc., is the plaintiff and the said Curtis Brown Company is the defendant, to the District Court of the United States for the Western District of New York.

Now, if the said Curtis Brown Company shall enter in said District Court of the United States within thirty (30) days from the date of the filing of said petition a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongly or improperly removed thereto, then this obligation to be void otherwise to remain in full force and virtue.

In witness whereof, the said United States Fidelity and Guaranty Company has caused its corporate seal to be hereto affixed, and these presents to be signed by its Attorney-in-fact, and attested by its Attorney-in-fact, this 21st day of March, 1921.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By S. FRANK HEDGES,
Attorney-in-Fact.

Attest:
ADOLPHUS A. JACKSON,
Attorney-in-Fact.

250 STATE OF NEW YORK,
County of New York, ss:

On this 21st day of March, 1921, before me personally came S. Frank Hedges, to me known, who, being by me duly sworn, did depose and say that he resided in the City of New York; that he was attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation: that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the said Company has received from the Superintendent of Insurance of the State of New York, a certificate of solvency and of its sufficiency as surety or guarantor, under Chapter 182 of the Insurance Law of the State of New York as amended by Chapter 182 of the Laws of 1913, and that such certificate has not been revoked. And the said S. Frank Hedges further said that he was acquainted with Adolphus A. Jackson and knew him to be the Attorney-in-fact of said company; that the signature of said Adolphus A. Jackson subscribed to the within instrument, is in the genuine handwriting of said Adol-

phus A. Jackson, was subscribed thereto by like order of said Board of Directors, and in the presence of him, the said S. Frank Hedges.

J. W. MILLER,

Notary Public New York County No. 330; Register No. 2828. Certificate filed in Kings County No. 138; Registered No. 2173. Bronx County No. 26; Register No. 2266. Queen's County No. 1975; Putnam, Westchester, Orange, Suffolk, Nassau, Richmond, Rockland. Term expires March 30th, 1922.

251 At a regular meeting of the Board of Directors of the United States Fidelity and Guaranty Company, duly called and held on the nineteenth day of January, A. D., 1914, at the office of the Company, in the City of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously:

Resolved, That Alonzo Gore Oakley, or Edward R. Lewis, or Adolphus A. Jackson, or William H. Estwick, or Gilman Ashburner, or A. Van Tambacht, or J. Frank Supplee, or E. G. Babcock, or George A. Reading, or Frank T. Gilson, or S. Frank Hedges, Attorneys-in-fact of this Company in the State of New York, be and they are hereby, and each of them is authorized and empowered to execute and deliver and to attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions or proceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require, and the aforesaid Attorneys-in-fact are, and each of them is, hereby authorized and empowered to certify a copy of this resolution under the seal of this Company.

STATE OF NEW YORK,
County of New York, ss:

I, S. Frank Hedges, Attorneys-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof as recorded in the minute book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the City of New York, this 21st day of March, 1921.

S. FRANK HEDGES,
Attorney-in-fact.

252 [Endorsed:] Served on C. C. W. March 28th, 1921, at 10.15 a. m. Supreme Court of the State of New York: County of Monroe. Rosenberg Bros. & Company, Inc., Plaintiff, vs. Curtis Brown Company, Defendant. Bond on Removal. Surety: United

States Fidelity and Guaranty Company. Siegel & Corn, 51 Chambers St., Attorneys for defendant, New York City, N. Y. Appearing specially only. The within Bond is hereby approved as to form and sufficiency. Dated March 24, 1921. Robert F. Thompson, Justice of the Supreme Court. Filed March 24, 1921. Monroe County Clerk's office.

253 District Court of the United States, Western District of New York.

ROSENBERG BROS. & COMPANY, INC.,

against

CURTIS BROWN COMPANY.

Werner & Harris of Rochester, New York, for plaintiff.
Siegel & Corn of New York City for the defendant.

Motion to Quash Service of Summons.

HAZEL, *District Judge:*

This action was originally brought in the Supreme Court of the State of New York in Monroe County against the Curtis Brown Company, and process was served upon its president in the city of New York while he was temporarily there. The defendant is a citizen of the state of Oklahoma, and engaged in the business of selling men's clothing at retail in the city of Tulsa. It appeared specially in the state court and moved to quash the summons on the ground of invalidity of service. Thereupon evidence was taken under an order of the state court upon the question of whether the president, at the time he was served with process, was within the state of New York for personal pleasure as he asserted, or whether he was, at such time, engaged in the business of the defendant. Before the motion was heard, and immendiately after the evidence was taken, the case was removed to this court.

Admittedly the corporation owns no property in this state. It has no agent here upon whom process may be served, and does not maintain an office or place of business in this state. A summary of the evidence fairly shows that the defendant corporation buys
254 goods here either by correspondence or through the instrumentality of a representative; that while the president was in the city of New York he made a few personal purchases, selected some merchandise for future purchase by the defendant, negotiated for the purchase of a quantity of hats, and adjusted a controversy with the firm of Crofut & Knapp of the city of New York. Such acts on his part were, in my judgment, merely incidental to his temporary stay, and they were not the object thereof. He was not charged by defendant with the performance of any of its business while casually sojourning in New York. Hence, the service of process upon him was not equivalent to a personal service of the cor-

poration, and in the circumstances, if a judgment followed the service, it would be invalid. St. Clair v. Cox, 106 U. S. 350; Riverside & Danbury River Co. v. Henafee, 237 U. S. 189.

In Centaur Motor Co. v. Eccleston, 264 Fed. 852, Judge Augustus N. Hand held that in a case rightly removed from a state court to a federal court, the question may be decided whether the state court had previously obtained jurisdiction of the person of the defendant, and the federal court could also pass upon questions raised in opposition to the jurisdiction of the state tribunal. It is important, therefore, to have in mind the rule applicable in the court where the action was originally brought. It is conceded by plaintiff's counsel that a foreign corporation which is not in business within the state is not brought within the jurisdiction of its courts by the mere presence of its agents, and that if the president was here solely for pleasure the service was illegal. But it is contended that if he performed any business for the corporation he was rightly served. I discover nothing in the record to warrant the holding that the defend-
255 ant was actually doing business at such time. It was not engaged in business as that term has many times been defined in the state and federal courts.

There is no hard and fast rule for determining what constitutes a transaction of business within this state by a foreign corporation for the purpose of serving an officer who is casually therein with process. There is insufficient evidence to show that defendant intended to subject itself either to the laws of the state or to its jurisdiction by the casual stay of its president or the incidental purchases made for or on account of the defendant. Although, under section 432 of the Code of Civil Procedure, a different rule applies to agents of foreign corporations, as distinguished from their executive officers, it is nevertheless essential that a corporation be engaged in business within the state. The mere presence of its agent or officer is not enough. To subject itself to the jurisdiction of the state court, it must be here with "a fair measure of permanence and continuity." Tauza v. Susquehannah Coal Company, 220 N. Y. 259.

I think a different rule applies where a defendant has no office or agent here to conduct its business, and simply occasionally sends an officer into the state to contract for the purchase and delivery of goods to its place of business in another state. Such contracts of sale do not constitute doing business in the state for the purposes of jurisdiction. It is also quite a different matter from sending workmen to another state to install machinery or construct a building and maintaining an agent or superintendent there upon whom process may be served. Beach v. Kerr Turbine Co., 243 Fed. 706, or as in St. Louis S. W. Ry. Co. v. Alexander, 227 U. S. 218, where the con-
tract was made in Texas, and the railroad company main-
256 tained an office in the city of New York, its agents conducting the business there in such a way that the inference was not unwarranted that the corporation had subjected itself to the jurisdiction. It makes no difference that in this case the president of the defendant was served with summons instead of an agent since, as pointed out, the corporation is not shown to have been substantially

engaged in doing business here, or that on a former occasion he made the contract out of which this cause of action arose.

Motion to quash service of summons is granted.

Dated, May 14, 1921.

JOHN R. HAZEL,
D. J.

257 [Endorsed:] Civil, #2023. United States District Court, Western District of New York. Rosenberg Bros. & Company, Inc., against Curtis Brown Company. Copy. Opinion. Hazel, D. J. Filed May 16, 1921. Harris S. Williams, Clerk.

258 At a Term of the District Court of the United States for the Western District of New York Held at the Federal Building, in the City of Buffalo, N. Y., on the 31st Day of May, 1921.

Present: Honorable John R. Hazel, District Judge.

In the District Court of the United States for the Western District of New York.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

This action having been commenced by the plaintiff, a corporation organized under the Laws of the State of New York, against the defendant, a corporation organized under the Laws of the State of Oklahoma, on the 3rd day of January, 1921, by the service of the summons in an action entitled: Supreme Court, Monroe County. Rosenberg Bros. & Company, Inc., plaintiff, against Curtis Brown Company, defendant, upon Curtis C. Brown, the President of the defendant who was then in the City, County, and State of New York, and the defendant thereafter and on the 19th day of January, 1921, having obtained from the Supreme Court of the State of New York an order to show cause, returnable before the Special Term of the Supreme Court to be held at the Court House in the City of Rochester, County of Monroe, and State of New York, on the 22nd
259 day of January, 1921, why the service of the summons in said action upon the said Curtis C. Brown, the President of the defendant, should not be set aside, declared to be invalid, and quashed, upon the ground that the Supreme Court of the State of New York had not acquired jurisdiction of the person of the defendant and that the defendant was not amenable to process of the Supreme Court of the State of New York; and said order to show cause having been brought on for a hearing before the Supreme Court of the State of New York, and such Court having thereupon directed, on the motion of the plaintiff, that the evidence of certain unwilling witnesses be taken by deposition, and that the hearing of

said motion and order to show ca-se be continued to and until the 2nd day of April, 1921; and the deposition of said witnesses having been taken as directed in said order, and on the 26th day of March, 1921, the said cause of action and said pending motion having been removed by the defendant to this Court, and said motion having come on for hearing before this Court at the Federal Building, in the City of Buffalo, on the 2nd day of April, 1921, at which time, by stipulation, it was continued until the 9th day of April, 1921, at which time said motion was heard by this Court,

Now, after reading and filing the affidavits of J. Leslie Seidenbach verified on the 11th day of January, 1921, and of Curtis Brown verified on the 15th day of January, 1921, in behalf of said motion, and the opposing affidavits of A. Ivan Brickner verified on the 21st day of January, 1921, Edward Rosenberg and Maurice Strauss, verified on the 4th and 2nd days of February, respectively, 1921, and the depositions of E. W. Bill, James G. Whitelaw, St. Clair Burns, Robert A. Holmes, Louis Lask, Abram L. Eichold, John B. Ahrens, and Helen Marie Donovan, taken before Dodge L. Marks, Referee,
260 in accordance with the said order for such depositions made by the Supreme Court of the State of New York, as aforesaid, and the replying affidavits of Curtis Brown, Arthur A. Brown, and Claude Shelton, each verified on the 15th day of March, 1921,

And after hearing Mr. Jacob H. Corn, of the firm of Siegel & Corn, attorneys for the defendant, in behalf of said motion, and Mr. George H. Harris, of the firm of Werner & Harris, attorneys for the plaintiff, opposed, it is

Ordered, that the motion to set aside, declare invalid, and quash the service of the summons in this action, brought by the plaintiff against the defendant in the Supreme Court of the State of New York and removed to this Court, be and the same hereby is granted upon the ground that the Supreme Court of the State of New York never had jurisdiction, and this Court, upon the removal of said action to it, acquired no jurisdiction of the person of the defendant, and that under the circumstances disclosed by the record in this Court the defendant was not amenable at the time of the service of the summons to the process of the Supreme Court of the State of New York.

JOHN R. HAZEL,
D. J.

261 [Endorsed:] Cir. 2023. U. S. District Court, Western District of N. Y. Rosenberg Bros. & Company, Inc., Plff., vs. Curtis Brown Company, Deft. Copy. Order setting aside, declaring invalid, and quashing the service of the summons herein. Werner & Harris, Attorneys for Plaintiff, 618 to 621 Union Trust Building, Rochester, N. Y. Filed May 31, 1921, Harris S. Williams, Clerk. Due personal service of copy of the within is hereby admitted, this — day of June, 1921. Siegel & Corn, deft. attys., appearing specially.

262 Supreme Court of the United States.

ROSENBERG BROS. & COMPANY, INC., Plaintiff in Error,

against

CURTIS BROWN COMPANY, Defendant in Error.

And now comes Rosenbrg Bros. & Company, Inc., plaintiff in error, and makes and files this its assignment of error:

1. The District Court of the United States for the Western District of New York erred in granting the motion to set aside, declare invalid, and quash the service of the summons upon the defendant in the cause brought against it by the plaintiff commenced in the Supreme Court of the State of New York on the 3rd day of January, 1921, and thereafter and on the 26th day of March, 1921, removed by the defendant to the District Court of the United States for the Western District of New York.

WERNER & HARRIS,
Attorneys for Plaintiff in Error.

619 Union Trust Building, Rochester, N. Y.

Read on application for appeal May 31st, 1921.

JOHN R. HAZEL,
District Judge.

263 [Endorsed:] Civ. 2023. Supreme Court of the U. S. Rosenberg Bros. & Company, Inc., Plff. in Error, vs. Curtis Brown Company, Deft. in Error. (Copy.) Assignment of Error. Werner & Harris, Attorneys for Plaintiff in Error, 618 to 621 Union Trust Building, Rochester, N. Y. Filed May 31, 1921. Harris S. Williams, Clerk. Due personal service of a copy of the within is hereby admitted, this 1 day of June 1921. Siegel & Corn, Attys. for Deft. in Error, appearing specially.

264 District Court of the United States for the Western District of New York.

ROSENBERG BROS. & COMPANY, INC., Plaintiff and Appellant,

against

CURTIS BROWN COMPANY, Defendant and Respondent.

The above-named plaintiff, Rosenberg Bros. & Company, Inc., conceiving itself aggrieved by the order entered on the 31st day of May, 1921, in the above entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States, and it prays that its appeal may be allowed and that a transcript of the said record and proceedings and papers upon which said order was made,

duly authenticated, may be sent to the Supreme Court of the United States.

WERNER & HARRIS,
Attorneys for the Plaintiff and Appellant,
Rosenberg Bros. & Company, Inc.

619 Union Trust Building, Rochester, N. Y.

Dated, Rochester, N. Y., May 31st, 1921.

And now, to wit: On May 31st, 1921; it is ordered that the appeal be allowed as prayed for.

JOHN R. HAZEL,
District Judge.

265 [Endorsed:] Civ. 2023. District Court of the U. S. Western District of N. Y. Rosenberg Bros. & Company, Plff.-Appllt., vs. Curtis Brown Company, Deft.-Respt. (Copy.) Appeal and Allowance. Werner & Harris, Attorneys for Plaintiff and Appellant, 618 to 621 Union Trust Building, Rochester, N. Y. Filed May 31, 1921, Harris S. Williams, Clerk. Due personal service of a copy of the within is hereby admitted, this — day of ——, 19—.

266 District Court of the United States for the Western District of New York.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

Certificate.

The District Court of the United States for the Western District of New York hereby certifies:

That on the 31st day of May, 1921, an order was entered in the above entitled action pursuant to the decision of said Court sustaining and granting a motion made by the defendant to set aside, declare to be invalid, and quash the service of the summons served upon the defendant in the Supreme Court of the State of New York on the 3rd day of January, 1921, such motion having originally been made in the Supreme Court of the State of New York and with said cause having been removed to this court on the 26th day of March, 1921, on all the grounds specified in the moving papers, namely:

1. That it appears from the said moving papers that the Surpeme Court of the State of New York never had jurisdiction and this court acquired no jurisdiction of the person of the defendant.

And this Court further certifies that in said cause the jurisdiction of this Court is in issue; and further certifies to the Supreme Court of the United States said question of jurisdiction raised by said moving papers on the ground aforesaid, namely: Was the de-
267 fendant, under the circumstances, disclosed by the record amenable to process of the Supreme Court of the State of New York?

Dated, Buffalo, N. Y., May 31st, 1921.

[SEAL.] JOHN R. HAZEL,
District Judge.

268 [Endorsed:] Civ. 2023. U. S. District Court, Western District of N. Y. Rosenberg Bros. & Company, Inc., Plff., vs. Curtis Brown Company, Deft. (Copy.) Certificate of Question of Jurisdiction. Werner & Harris, Attorneys for Plaintiff, 618 to 621 Union Trust Building, Rochester, N. Y. Filed May 31, 1921, Harris S. Williams, Clerk. Due personal service of a copy of the within is hereby admitted, this — day of ——, 19—.

269 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the order of a plea which is in the said District Court, before you, by Rosenberg Bros. & Company, Inc., plaintiff, and Curtis Brown Company, defendant, a manifest error hath happened to the great damage of the said plaintiff Rosenberg Bros. & Company, Inc., as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 27th day of June next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Oliver Wendell Holmes, Acting Chief Justice of the said Supreme Court, the 31st day of May, in the year of our Lord one thousand nine hundred and twenty-one.

HARRIS S. WILLIAMS,
Clerk of the United States District Court,
Western District of New York.

Allowed by:
JOHN R. HAZEL.

270 [Endorsed:] Civ., 2023. U. S. Supreme Court. Rosenberg Bros. & Company, Inc., Plaintiff, vs. Curtis Brown Company, Defendant. (Copy.) Writ of Error from Supreme Court to District Court of the United States for the Western District of New York. Werner & Harris, Attorneys for Plaintiff, 618 to 621 Union Trust Building, Rochester, N. Y. Filed June 4, 1921, Harris S. Williams, Clerk. Due personal service of a copy of the within is hereby admitted, this 1- day of June 1921. Siegel & Corn, Atty. for Deft. in Error, Appearing Specially.

271 UNITED STATES OF AMERICA, *ss:*

To Curtis Brown Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the 27th day of June, nineteen hundred and twenty-one, pursuant to an appeal, filed in the Clerk's Office of the District Court of the United States for the Western District of New York, wherein Rosenberg Bros. & Company, Inc., is appellant and Curtis Brown Company is respondent, to show cause, if any there be, why the order in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Oliver Wendell Holmes, Acting Chief Justice of the Supreme Court of the United States, this 31st day of May, in the year of our Lord one thousand nine hunderd and twenty-one.

JOHN R. HAZEL,
United States District Judge.

272 [Endorsed:] Civ., 2023. U. S. Supreme Court. Rosenberg Bros. & Company, Inc., Plff., vs. Curtis Brown Company, Deft. (Original). Citation on Appeal. Filed Jun. 4, 1921, At — o'c — M. Harris S. Williams, clerk. Werner & Harris, Attorneys for Plaintiff, 618 to 621 Union Trust Building, Rochester, N. Y.

273 District Court of the United States for the Western District of New York.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, INC., Defendant.

It is hereby stipulated by and between the parties hereto that upon the appeal to the Supreme Court of the United States herein, this Court shall transmit to that Court as the transcript of the record in this case the following portions of the record in this Court, which are hereby desingnated by both parties as provided by Rule Eight of the Rules of the Supreme Court of the United States:

1. Order to show ca-se in the action entitled "State of New York. Supreme Court, Monroe County. Rosenberg Bros. & Company, Inc., Plaintiff, against Curtis Brown Company, Defendant" granted on the 19th day of January, 1921, by Edward R. Finch, Justice.

2. Copy of the Summons in the same action dated January 3, 1921.

3. Affidavit of J. Leslie Seidenbach verified on the 18th day of January, 1921.

4. Affidavit of Curtis Brown in the same action verified January 15th, 1921.

5. Affidavit of Jacob H. Corn in the same action verified January 19, 1921.

6. That portion of the affidavit of Maurice Strauss in said action verified on the 2nd day of February, 1921, set forth in folios
274 1 to 28 thereof, inclusive; that portion of the affidavit of the said Maurice Strauss commencing in folio 28 with the words "that as deponent is informed and verily believes", and ending with the words in folio 50 "and they respectively decline to make any affidavit whatsoever herein" shall be omitted from said transcript.

7. The affidavit of Edward Rosenberg in said action verified on the 4th day of February, 1921.

8. The affidavit of A. Ivan Brickner in said action verified on the 21st day of January, 1921.

9. Order made by the Supreme Court of the State of New York in the above entitled action on the 5th day of February, 1921, Hon. A. J. Rodenbeck presiding, directing that the depositions of E. W. Bill, J. G. Whitehall, St. Clair Burns, R. A. Holmes, William Lask, A. L. Eichold, John P. Ahrens and Hellen M. Donovan, be taken before Dodge L. Marks, Esq.,

10. Depositions of Edward W. Bill, James G. Whitehall, St. Clair Burns, Robert A. Holmes, Louis Lask, Helen M. Donovan, John P. Ahrens and Abraham Eichold taken before Dodge L. Marks, Esq., pursuant to said order of February 5th, 1921.

11. Defendant's replying affidavits of Curtis Brown, Arthur A. Brown and Claude Skelton, each verified on the 15th day of March, 1921.

12. Petition of defendant verified by its attorney, Jacob H. Corn, on the 23rd day of March, 1921, and Notice of Removal under date of March 26th, 1921, of the action in the Supreme Court of the State of New York to this Court.

13. Memorandum of decision under date of May 14th, 1921, of Hon. John R. Hazel on this motion.

275 14. Order setting aside, declaring invalid, and quashing the service of the summons herein.

15. Plaintiff's Assignment of Error, Prayer for Appeal, Certificate of Question of Jurisdiction, Writ of Error, Citation on Appeal.

Dated, June —, 1921.

WERNER & HARRIS,
Attorneys for Plaintiff in Error.
SIEGEL & CORN,
Attorneys for Defendant in Error.

276 [Endorsed:] Civ., 2023. District Court of the U. S., Western District of N. Y. Rosenberg Bros. & Company, Inc., Plff., vs. Curtis Brown Company Deft. (Original). Stipulation Agreeing upon Transcript on Appeal. Filed Jun. 11, 1921, at — o'c. — m. Harris S. Williams, Clerk. Werner & Harris, Attorneys for Plaintiff, 618 to 621 Insurance Building, Rochester, N. Y.

277 UNITED STATES OF AMERICA,
Western District of New York, ss:

I, Harris S. Williams, Clerk of the District Court of the United States of America for the Western District of New York, do hereby certify that the foregoing and annexed typewritten copy has been presented to me with a stipulation by the attorneys of the parties that such typewritten copy is a true transcript of the record on appeal to the United States Supreme Court from a decree of the United States District Court for the Western District of New York in the action in said District Court entitled Rosenberg Bros. & Company Inc. versus Curtis Brown Company Inc. as agreed upon by the parties and I do certify the same to be the transcript of record on said appeal.

In Testimony Whereof, I have caused the seal of the said Court to be affixed at the City of Buffalo in said District, this 18th day of June A. D. 1921.

[Seal of the United States District Court, Western District of New York.]

HARRIS S. WILLIAMS,
Clerk.

Copy.

Supreme Court, Monroe County.

ROSENBERG BROS. & COMPANY, INC., Plaintiff,

against

CURTIS BROWN COMPANY, Defendant.

Depositions.

Werner & Harris, attorneys for plaintiff, 619 Union Trust Bldg., Rochester, N. Y.

Filed Apr. 26, 1921.

HARRIS S. WILLIAMS,
Clerk.

Endorsed on cover: File No. 28,333. Western New York D. C. U. S. Term No. 378. Rosenberg Bros. & Company, Inc., plaintiff in error, vs. Curtis Brown Company. Filed June 25th, 1921. File No. 28,333.

FILED
MAY 6 1922
WM. R. STANSBURY
CLERK

No. [redacted]109

In the Supreme Court of the United States

OCTOBER TERM, 1921.

ROSENBERG BROS. & COMPANY, INC.,
PLAINTIFF IN ERROR,

v.

CURTIS BROWN COMPANY,
DEFENDANT IN ERROR.

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

DAILY RECORD COMPANY, ROCHESTER, N. Y.

In the Supreme Court of the United States

OCTOBER TERM, 1921.

ROSENBERG BROS. & COMPANY, INC., Plaintiff in Error,

v.

CURTIS BROWN COMPANY, Defendant in Error.

No. 378.

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This case presents the question of the sufficiency of the service of process on Curtis Brown, the president of the Curtis Brown Company, an Oklahoma corporation, in a civil action to recover damages for the breach of a contract, commenced on the 3rd day of January, 1921, in the Supreme Court of the State of New York (259, 260-266).

The defendant appeared specially and moved to set aside the service upon the ground that the defendant had never been engaged in business in the State of New York, and that its President was not then within the State of New York on any business of the corporation.

Two days before the argument of the motion in the Supreme Court of the State of New York the defendant removed the action to the District Court of the United States for the Western District of New York, where the motion was heard.

That court, Honorable John R. Hazel presiding, rendered its decision on the 3rd day of May, 1921, setting aside and quashing the service of the summons upon the ground that the defendant was not amenable to process of the Supreme Court of the State of New York (258-260). In making its decision the court wrote an opinion (253-255).

II.

SPECIFICATION OF ERROR.

The District Judge was in error in his findings of fact and the conclusion of law based thereon that the defendant was not amenable to process of the Supreme Court of the State of New York.

III.

THE ARGUMENT.

The undisputed facts establish:

(a) The cause of action arose on a contract made in the State of New York, wholly to be performed there.

(b) At the time of the service of the process its President was there, authorized to transact, and transacting its business.

(c) The defendant was regularly doing business in the State of New York.

FACTS.

(*a*) *The cause of action arose on a contract made in the State of New York, wholly to be performed there.*

The plaintiff is a corporation organized under the laws of the State of New York and extensively engaged at

Rochester, New York, in the manufacture of a distinct and exclusive line of men's ready made clothing.

In the ordinary course of its business the plaintiff takes orders on sample and contracts to manufacture and deliver at Rochester, New York, merchandise to its customers. Its policy was to sell to but one customer in cities of less than 300,000 inhabitants.

The defendant is an Oklahoma corporation, engaged at Tulsa, Okla., in retailing men's clothing, furnishings, and hats; organized in 1918 to succeed the Brown & Blazer Clothing Company, Inc.; it has an authorized capital of seventy-five hundred dollars ($7500.00). Curtis C. Brown, its President, owns sixty-nine (69) of its shares; his brother, a clerk in its store, five shares, and Claude A. Shelton, another clerk, one share (34-35). Its sales for 1919 exceeded $200,000.00 (35).

In the strictest sense it is a close corporation and the creature of Curtis C. Brown, its president. On October 31st, 1918, the defendant advised the plaintiff, "I am pleased to inform you that I now own all of the stock of the Brown & Blazer Clothing Company, Inc. I purchased Mr. Blazer's one-half interest in same out of my personal funds and the finances of the company were in no way affected." The defendant corporation as it now exists was the result of this transaction (34-35).

In January of 1918, the Brown & Blazer Clothing Company, defendant's predecessor, by the said Curtis C. Brown, came to the plaintiff's plant at Rochester, New York, and there solicited and arranged for the purchase, from season to season, of plaintiff's line of clothing to be sold exclusively at retail by the Brown & Blazer Clothing Company in the City of Tulsa, Okla. (16, 19 and 232). The arrangement so made proved satisfactory to both parties and was continued by the defendant and its predecessor until the controversy occurred out of which this action arose.

In pursuance of the arrangements originally made between the parties and in the ordinary course of their dealings the defendant, by its president, on the 23rd day of June, 1920, did visit the plaintiff's manufacturing plant at Rochester, New York, and then and there contracted with the plaintiff to manufacture at Rochester, New York, from samples selected by the defendant certain men's clothing which, by the terms of the contract was to be delivered to the defendant f. o. b. cars Rochester, New York, billed to it at Tulsa, Okla., for the Fall and Winter season of 1920-21, and to be paid for at Rochester, New York (38-41).

The plaintiff manufactured the merchandise and in due course delivered it to the defendant f. o. b. cars, Rochester, New York, billed to the defendant at Tulsa, Oklahoma.

On receipt of the merchandise at Tulsa the defendant, after selecting 48 garments of the aggregate price of $2560.40, returned the remaining 476 garments of the aggregate price of $25,320.10, for no reason other than that the defendant had contracted and agreed to pay too high a price therefor (39-42). Defendant has never paid, or offered to pay, anything on account of the contract.

In the latter part of August, 1920, the value of men's clothing, in common with all other products, rapidly declined.

(*b*) *At the time of the service of the process its President was there, authorized to transact, and transacting its business.*

Curtis C. Brown, defendant's president, in moving to set aside the service of the summons first deposed "Deponent was in the State of New York solely upon a personal pleasure trip, having left Chicago and gone to the City of New York for the purpose of spending New Year's Eve there bent solely on personal pleasure. Affiant had no business and undertook to transact no busi-

ness for the defendant corporation in the State of New York on said trip" (9-10).

In investigating the accuracy of this testimony of defendant's president, plaintiff inquired of several houses engaged in business in New York City from whom defendant was accustomed to make purchases at this time in the year, and upon their expressed unwillingness to state the fact because of the relation existing between them and the defendant evidence thereof was taken under the laws of the State of New York by deposition.

On this inquiry the following facts were ascertained:

A controversy then existed (189-191, Ex. K12; 187, Ex. K10) between the defendant and the firm of Blum & Koch, Inc., relative to orders for several thousand dollars of hats placed by the defendant with that corporation on July 20, 1920. (191-192; Exs. K21, K22, K23, K24 and K25), which orders defendant had been seeking to cancel (187, Ex. K10). On December 18th Blum & Koch, Inc., had written the defendant suggesting a compromise of the controversy (64, Ex. K15). To which the defendant replied under date of December 21, 1920 (Blum & Koch, Inc., claimed to be unable to produce this letter for the reason that it was lost or destroyed) (197-202), but under date of December 27th, 1920, it wrote the defendant as follows:

"We are in receipt of your favor of the 21st inst. and in accordance with your request will hold your spring order in abeyance awaiting the pleasure of a call from your Mr. Curtis Brown, whom, you state, expects to be here sometime in January."

Blum & Koch did actually hold the matter in abeyance until Curtis Brown, defendant's president, called at their office in New York City during the week of January 3rd on the occasion of this trip (197, 199, 163-165) and the controversy was then settled by a cancellation of the

orders in part and the delivery of the remainder at a reduced price (205, 197-202, and 163-172).

At the same time a controversy existed between the defendant and Crofut & Knapp (147-148) having sales rooms at 251 Fifth Avenue, New York City, respecting order for hats placed by the defendant with that concern in July, 1920, for delivery in the spring of 1921 (156; Exs. C3, C4, C5, and C6).

On January 5th, defendant's president, visited the sales rooms of Crofut & Knapp and asked for Mr. Holmes, the Vice-President of that concern (128). Mr. Holmes was telephoned for and after he had arrived this pending controversy was settled (151) by the cancellation of some portion of the order, the re-instatement of a portion thereof, and an agreement to re-instate the remainder upon an agreed reduction in price (137-143, Ex. C7). Curtis C. Brown, the defendant's president, had brought with him, had, and used, for the purpose of negotiating this settlement all of defendant's records, data, and memoranda referring to this controversy (140-141). After the controversy had been settled, and on the same occasion, defendant, through its President Curtis C. Brown, purchased from Crofut & Knapp an additional bill of goods (130-131; Ex. C10, C1, C2, C11, and C12), under date of January 5th, which defendant confirmed over the signature of Curtis Brown on January 5th, mailed to Crofut & Knapp, and by them received January 8th (156, Ex. C10, 153).

On January 4th defendant's President visited the place of business of Bill & Caldwell at 741 Broadway, New York City (68-70), and while there purchased a bill of goods (71-77, 87-96) to be delivered "at once" (118, Exs. B1, B2, and B3), which was in writing confirmed by the defendant over the signature of the said Curtis Brown under date of January 4th, 1921 (Exs. A4 and A5). The bulk of these goods were shipped to defendant on Janu-

ary 5th by express (91, Exs. B9, B4, B1, B7), when Brown was still in New York City. While at the office of Bill & Caldwell final and satisfactory arrangements were made between the defendant and that firm relative to an order given by the defendant in the preceding July for delivery in the following spring (Exs. A7, 93-95).

On the morning of January 3rd, while on this trip, Brown visited the plaintiff's sales room in the City of New York for the purpose, as he says, of paying a friendly visit to its Mr. Brickner. Whatever the purpose of his visit was, he was there engaged in discussing with its Mr. Brickner the subject matter of the controversy at the time when the summons in this action was served upon him (61).

(c) *The defendant was regularly doing business in the State of New York.*

Prior to and in January of 1921, the defendant, by its President, Curtis C. Brown, was making a regular practice of coming into the State of New York from two to four times a year to purchase merchandise generally other than from the plaintiff. Some of those from whom it regularly purchased on such occasions were Snellenberg Clothing Co., Rosenwald & Weill, Bates Shirt Co., Crofut & Knapp, Kay & Einstein, Rain Wear, Centemira & Co., Mark Cross & Co., A. W. Cohen & Co., Phoenix Knitting Mills Co., George Fox & Co., Ansorge Bros., Heidelberg-Wolff & Co., Bill & Caldwell, Koch & Knapp, Inc., and Alexander Company (21-28),

In his answering affidavit Brown says, "When I am in New York on a purchasing trip in the early part of the year I buy goods amounting to many thousand dollars. For instance, in the early part of 1920, the defendant purchased in New York (other than from the plaintiff) about $16,000.00; in 1919, about $22,000.00; in 1918, $18,000.00. When I am in New York on these trips for the

purchase of goods, I visit from twenty to forty concerns. * * * On a buying trip I am usually there from ten to twenty days investigating stocks and prices with full memorandum and data of stock on hand and merchandise to be bought" (233).

Exactly when Curtis C. Brown left Tulsa, Oklahoma, on the occasion of this trip, when he reached New York City, when he left New York City, or when he reached Tulsa, Okla., on his return is not disclosed. He met Seidenbach on the afternoon of Friday, December 31st, at the Pennsylvania Hotel in New York City (7). He was served with the summons at plaintiff's sales rooms, 200 Fifth Avenue, on the 3rd day of January, 1921 (62).

On January 4th he ordered a bill of goods from Bill & Caldwell, executed the confirmation thereof, and mailed the same to Bill & Caldwell on that day (87-96; 118, Exs. A4, A5).

On January 5th, having with him the records of the defendant, he visited the place of business of Crofut & Knapp and there settled an existing controversy, ordered an additional bill of goods and thereafter, on the same day, executed for the defendant a confirmation of said order (138-151, 128-132, 156, Ex. C10).

Subsequently—the time is not fixed—he visited the place of business of Blum & Koch, by appointment previously made by the defendant in writing, and settled that controvessy.

Thereafter—the exact time is not disclosed—he visited the place of business of Mark Cross Company, 404 Fifth Avenue, New York City, and there made purchases which he contends were for his personal account, but which, at his direction, were charged to the account of the defendant, he signing the necessary authorization therefor in the name of the defendant (214-221, 207-212).

He was not in Tulsa, Okla., to reply to Crofut & Knapp's telegram until January 12th (156).

With ample opportunity for so doing, the defendant failed to state that the expenses of its President while on said trip to New York City were not paid by it.

AUTHORITIES.

The service was authorized by the statutes and decisions of the highest courts of the State of New York.

In the earlier case of *Estes et al. vs. Bedford et al.*, 28 Fed. 225, arising in the State of New York, Opinion by Hand, J., the court says:

"The service was good if made according to the laws of the State upon the corporation found here according to the laws of the United States. This has always been the law. Whether service of process issued by a state court will be deemed sufficient under the laws of the state, the decision of the highest courts of the state on that point will be regarded as controlling."

International Harvester Co. vs. Kentucky, 234 U. S. 579.

At the time of the service, Section 432 of the Code of Civil Procedure of New York State provided:

"Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the State, as follows:

1. To the President, vice-president, treasurer, assistant-treasurer, secretary or assistant secretary; or, if the coporation lacks either of these officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose as provided in Section 16 of the General Corporation Law.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first in this section, can be found with due diligence, and the corporation has property within the State, or

the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State."

In determining the sufficiency of service of process upon a foreign corporation, the Court of Appeals of the State of New York holds that the question is merely "whether the corporation is here" at the time of the service.

Tauza vs. Susquehanna Coal Co., 220 N. Y. 268.

Dollar Company vs. Canadian Car & Foundry Co., 220 N. Y. 270.

Bagdon vs. Philadelphia & Reading Coal & Iron Co., 217 N. Y. 438.

Not only do the authorities in the State of New York but the statute itself also does distinguish in determining the question of jurisdiction between that class of actions where the cause of action arose within the State of New York and those where it did not.

THE QUESTION IS ONE OF FACT.

For the purposes of this argument we shall assume it has been determined by this court, "where a foreign corporation is a party, it is necessary that it either (a) should be doing business in the State; or (b) that the process be served on an officer of the corporation while he is within the State engaged in the corporation's business."

Dan River Cotton Mills vs. Menefee, 237 U. S. 189.

If the corporation is regularly doing business within the State, then service may be made upon one of its executive officers irrespective of the purpose for which he is within the State. If it is not regularly doing business within the State, then the service must be made upon

an officer while he is within the State in his official capacity authorized to act for it.

This court has not yet applied the law to a state of facts identical with or substantially similar to those presented by this case. We submit, however, that the case is within the principles (if not within the facts) of such decisions as

St. Louis & Southwestern Railway Co. vs. Alexander, 227 U. S. 218.

Mutual Life Ins. Co. vs. Spratling, 172 U. S. 603.

Lumbermen's Ins. Co. vs. Meyer, 197 U. S. 407.

International Harvester Co. of Am. vs. Commonwealth of Kentucky, 234 U. S. 379.

In the decisions of the Circuit Court of Appeals and in the District Court applying the law to essentially similar facts, there is a conflict of authority to which we shall later on direct the attention of the court.

Of the test to be applied to the question here involved, this court has said "No all embracing rule by which it may be determined what constitutes doing business by a foreign corporation has been laid down by the Supreme Court of the United States. In a general may it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and the laws of the district in which it is served and in which it is bound to appear when a proper agent has been served by a process."

St. Louis & Southwestern Railway Co. vs. Alexander (*Supra*).

In the latter case the fact that the agent of the Railway Company took up, considered, and attempted to settle the plaintiff's claim and was served only after such negotiations for a settlement had failed was held suffi-

cient, the court saying, "Here then was an authorized agent attending to this and presumably other matters of a kindred character undertaking to act for and represent the company, negotiating for it and in its behalf declining to adjust the claim made against it. We think this was a transaction of business in behalf of the company by its authorized agent sufficient to bring it within the district of New York, in which it was sued, and to make it subject to the service of process there" (P. 228 of Op.).

In *NewHaven Company vs. Downington* (C. C.) 130 Fed. 605, where there was but the one transaction out of which the cause of action arose, service upon the defendant's representative while he was within the State of Connecticut for the purpose of negotiating a settlement of the controversy was held good, the court saying, "Doing business within a state does not require that it be done persistently and continuously."

THE TENDENCY OF LEGISLATION AND JUDICIAL DECISIONS IS IN THE DIRECTION OF PLACING CORPORATIONS AND NATURAL PERSONS UPON THE SAME FOOTING.

Any individual may be served in any State where he is found without regard to the place of his residence. A corporation should be entitled to no greater exemption.

Eaton vs. St. Louis Smelting Co., 7 Fed. Rep. 145.

Estes et al. vs. Bedford et al., 22 Fed. 275.

Revans vs. Southern Mo. & Ar. Co., 114 Fed. 982.

McCord Lumber Co. vs. Doyle et al., 97 Fed. 22.

In *Barrow Steamship Co. vs. Kane*, 170 U. S. page 106, Mr. Justice Gray, then of this court, said "The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same

footing as natural persons in regard to the jurisdiction of suits by or against them."

Judge Westenhaver, of the United States District Court for the Northern District of Ohio, in a well considered opinion, in which he collates the more recent decisions of the federal courts and the legislation of both the state and nation, reaches a conclusion which he expresses as follows: "The tendency of legislation and of judicial decisions is and has been to make it easy to obtain jurisdiction of foreign corporations."

Beach vs. Kerr Turbine Co., 243 Fed. 711 of Op.

THIS COURT WILL REVIEW THE FINDINGS OF FACT AS WELL AS THE CONCLUSIONS OF LAW OF THE LOWER COURT.

"Whether the corporation was doing business within the State and whether the person served was an authorized agent are questions vital to the jurisdiction of the court. A decision of the lower court on either question if duly challenged is subject to review in this court; and the review extends to findings of fact as well as to conclusions of law." (Mr. Justice Brandeis in Philadelphia & Reading R. R. Co. vs. McKibbin, 243 U. S. p. 265 of Op.).

CONCLUSION.

THE FACTS OF THIS CASE ARE SUFFICIENT TO CONFER JURISDICTION.

(a) The defendant was a close corporation. It was the creature of Curtis Brown, its president, upon whom the process was served. He was not its creature, or its servant or agent, in the sense that he required any specific delegation of authority to act for it. He owned the corporation and the evidence discloses that he, at all times, assumed and exercised authority to act for it without any specific action of his board of directors. The

evidence of the two clerks in the defendant's store—one owning five shares, and the other one share of its stock —that Brown had not been delegated with specific authority on the occasion of this trip to New York City, is immaterial, for it is not shown that he had ever been on any previous occasion especially delegated or authorized to act.

(b) The defendant was, at the time of the service of process, from its creation as a corporation, regularly coming into the State of New York from two or four times a year in the person of the said Curtis Brown, its president, for the purpose of purchasing a very large and substantial part, if not the bulk, of its merchandise to be sold at retail, in Tulsa, Oklahoma (21-28). At the very time of the service at least three contracts for the manufacture of merchandise for delivery in the State of New York in the following Spring, ordered by it in the preceding July, were pending in dispute and unperformed.

This evidence is undisputed and the defendant admitted it was then coming, and had come, into the State of New York from the time of its organization in the early part of the year to purchase in large and substantial amounts its merchandise requirements, on each of which occasions it had remained within the State from ten to twenty days.

It was just as necessary and essential to the success and life of the defendant's business that it should somewhere cheaply and wisely purchase its merchandise requirements as it was to profitably sell them from its retail store in Tulsa, Oklahoma. It deemed it advantageous to regularly come into the State of New York in the person of its President for the purpose of making the bulk of such purchases. The volume of business regularly transacted by it in this way was much greater in proportion than that transacted by the International Harvester Co.

in the State of Kentucky, and under the principles laid down in the latter action it was clearly doing business within the State of New York.

In his Opinion, the District Judge, after laying stress upon the fact that the corporation owned no property in the State, and has no agent there upon whom process might be served, and that it maintained no office or place of business in that State, says "A summary of the evidence fairly shows that the defendant corporation buys goods here either by correspondence or through the instrumentality of a representative (254). * * * I discover nothing in the record to warrant the holding that the defendant was actually doing business at such time. It was not engaged in business, as that term has many times been defined in the State and Federal courts (255). * * * It makes no difference that in this case the president of the defendant was served with summons since, as pointed out, the corporation is not shown to have been substantially engaged in doing business here" (256).

In reaching this conclusion that the defendant was not engaged in business in the State of New York sufficiently to confer jurisdiction the learned trial judge was, no doubt, influenced by his earlier decision in the action of *Buffalo Glass Co. vs. Manufacturers Glass Co.*, 142 Fed. Rep. 273, decided in 1905, and by the reasoning of Judge Wallace in the case of *Good Hope vs. Railway Barb Fencing Co.*, 22 Fed. Rep. 635, in which it is said, "Where a corporation is not engaged in business in this State there is no room for implying its consent to come here to litigate with a citizen of this State, or of a foreign state. In this case the president was here in his representative capacity, but the corporation had never been practically engaged in business here. It had made purchases here occasionally, but it could have made them by correspondence as well as by the presence of its agents here. If the purchases had been made by correspondence, it

could be as logically urged that the corporation was engaged in business here as it can be now. Instead of writing, its agent came here in person. As it has never kept an office here, or carried on any part of its business operations, or been engaged in any business here which required it to invoke the comity of the laws of the State, it was not found here for the purpose of being sued."

Under the decision of this Court in the Menafee case Judge Wallace was clearly in error in his conclusion that even though the president of the foreign corporation was within the State in his representative capacity that fact was insufficient to confer jurisdiction.

Directly in conflict with the decision of the court in this case, the Buffalo Glass case and the Good Hope case, cited above are the decisions in

Empire Fuel Co. vs. Lyons, 253 Fed. 892-94.

McCord Lumber Co. et al. vs. Doyle, 97 Fed. 24 of Op.

We shall only advert to these decisions to point out that in the Empire Fuel case a single contract solicited by the defendant, pending unperformed within the State, was held sufficient to constitute doing business within the requirements of the service of process.

These facts bring the case likewise within the principles laid down by this court in *Insurance Co. vs. Spratling*, 172 U. S. 602, and *International Harvester Co. vs. Kentucky*, 234 U. S. 584.

That the defendant might have transacted its business by correspondence, that it was not for licensing or taxation purposes engaged in business in the State of New York as that term has many times been defined in the State and Federal courts, that it did not intend to subject itself to the Laws of the State of New York or its jurisdiction, are all immaterial. (*International Harvester Co. vs. Kentucky, supra*).

In the latter case the defendant, prior to any of its acts, expressly disclaimed any intention of doing business within the State of Kentucky and studiously avoided the performance of any acts which might have required it to take out a license to do business under the laws of that or any other state. Nevertheless, it was held that for the purpose of conferring jurisdiction by the service of process it was doing business within that state.

(c) The cause of action arose in the State of New York on a contract solicited by the defendant through its President, the identical person served in the State of New York, wholly to be performed and paid for in that state. Its President, the identical person who solicited the contract within the State, was served with process while in the plaintiff's place of business, within the State, engaged at the time in discussing with one of plaintiff's employees the contract out of which the cause of action arose. The learned trial judge held that this fact was insufficient to confer jurisdiction.

Upon a careful examination of the authorities, we have been unable to find any other case clearly and unmistakably holding to the same effect, whereas the entire weight of authority in the lower courts has been to the exact contrary.

New Haven Pulp & Board Co. vs. Downington Mfg. Co., 130 Fed. 605.

McCord Lumber Co. et al. vs. Doyle, 97 Fed. 12.

Houston et al. vs. Filer & Stowell Co., 85 Fed. 757.

Twin Lake Land and Water Co. vs. Dohner, 242 Fed. 403.

Brush Creek Coal Co. vs. Martin Electric Co., 136 Fed. 505.

Beach vs. Kerr Turbine Co., 243 Fed. 706.

Empire Fuel Co. vs. Lyons, 257 Fed. 890.

Estes et al vs. Bedford et al., 22 Fed. 225.
Eaton vs. St. Louis Smelting Co., 7 Fed. 145.
Revans vs. Southern Mo. & Ar. Co., 114 Fed. 982.

"It is not a hardship upon the defendant; or, if any, not an undue hardship upon it as between it and the plaintiff, if it is compelled to answer away from its domicile, but not any further away than it went voluntarily to seek and induce the plaintiff to enter into the contract which by reason of its wrong or default has given occasion for the process and its service."

Ester et al vs. Bedford et al. (*Supra*).

(d) At the time of the service of process the defendant was actually in the State of New York and its president was actually in the State of New York authorized to transact and transacting business for it.

1. On December 21st, 1919, the defendant had written Blum & Koch, Inc., of New York City, requesting it to withhold determination of a matter in controversy between the parties pending the call of its Mr. Curtis Brown early in January (164). On December 27th Blum & Koch had assented to this proposal (164). In pursuance of that communication defendant's president, on the occasion of the service upon him, did call on Blum & Koch and setled the controversy (201).

2. On this trip defendant's president did call at the office of Crofut & Knapp in New York City, then having with him all of the defendant's papers, data, and memorandum relating to a controversy with that concern (140), which he settled in behalf of the defendant (140-146), after which he purchased from Crofut & Knapp, for the defendant, a bill of goods (156, Ex. C9), which was confirmed by the defendant over his signature on January 5th, 1920, while still in New York City (156, Ex. C10).

3. On January 4th, while on this trip, the defendant, in the person of its president, called on Bill & Caldwell while in New York City and purchased a bill of goods to be shipped at once (68-76, 118, Exs. A1, A2, and A3), which the defendant, in New York City, under date of January 4th, over the signature of Curtis Brown, its president, confirmed on the same day (Exs. A5 and A6). After which an agreement was made with Bill & Caldwell for the shipment of goods ordered in the preceding July at a reduced price.

Indisputably the defendant in the person of Curtis Brown, its president, was in New York State on the occasion of the service of the Summons by previous appointment, having in his possession certain of its records and documents settling previously existing controversies and purchasing bills of merchandise for it. These facts were sufficient to confer jurisdiction.

"The defendant corporation seems to have been still engaged in business in the State of Minnesota when service was obtained since its President was then in the State for the purpose of conferring in behalf of his Company with a certain other corporation with which it had business relations."

McCord Lumber Co. vs. Doyle, 97 Fed. 22. (Circuit Court of Appeals, 8th Circuit).

To a like effect

Houston et al. vs. Filer & Stowell Co., 85 Fed. 757.

New Haven Pulp & Board Co. vs. Downington Mfg. Co., 130 Fed. 605.

Even if the question presented were a close one, and even though no one of the things which the defendant or Curtis Brown, its President, did, was enough to constitute doing business in the State of New York, if the record taken together as a whole discloses that the de-

fendant was doing business within the State of New York, or that its president was in the State of New York transacting it business, it is sufficient.

Empire Fuel Co. vs. Lyons, 257 Fed. 890.

The case at bar discloses the defendant, (a) a close corporation owned by its president, regularly coming into the State of New York from two to four times a year and there purchasing the bulk of its merchandise requirements; (b) the contract out of which the cause of action arose solicited and made by the defendant in the person of such president in the State of New York, where the cause of action accrued; (c) service of the summons upon the defendant in the person of such president while he was within the State of New York discussing the subject matter of the cause of action with one of plaintiff's employees and while he was within the State by appointment of the defendant, at the time in possession of its records and engaged in the settlement of controversies between the defendant and two other concerns in the State of New York and purchasing at least two separate and distinct bills of merchandise for it from two oth concerns in the State of New York.

Any one of these three essential facts under the principles laid down by this Court should be held sufficient to confer the necessary jurisdiction.

The order of the District Judge should be reversed and the action remained to that court for further action.

All of which is respectfully submitted.

WERNER, HARRIS & BUCK,
Attorneys for Plaintiff in Error,
619 Union Trust Building,
Rochester, N. Y.

GEORGE H. HARRIS,
Of Counsel.

FILED
AUG 15 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. [redacted]102

ROSENBERG BROS. & CO., INC.,
Plaintiff-in-Error,

against

CURTIS BROWN COMPANY,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

JACOB CORN,
ISAAC SIEGEL,
Attorneys for Defendant-in-Error.

INDEX.

		PAGE
STATEMENT OF THE CASE		1
THE FACTS		3
A. Discussion of Visit to Mark Cross & Co		9
B. Discussion of Visit to Blum & Koch		10
C. Discussion of Visit to Bill & Caldwell		12
D. Discussion of Visit to Crofut & Knapp		14
SUMMARY OF THE DISCUSSION OF FACTS		15
ARGUMENT		16
PART I:	The rule is firmly established that the phrase "doing business" in relation to the service of process means an established carrying on of business in the jurisdiction of service, and the contention that a temporary visit of an officer, even though on business of the corporation, gives jurisdiction, has never been adopted by this Court	17
PART II:	The acts done by Brown, the President, while here, did not constitute doing business, even within those decisions of subordinate jurisdictions that hold that the temporary visit of an officer of a corporation on business of the corporation, confers jurisdiction	18
PART III:	Discussion of cases in United States Supreme Court	23
PART IV:	New York authorities	31
PART V:	Federal Courts other than Supreme Court	37
CONCLUSION		43

LIST OF CASES CITED

	PAGE
Bagden *v.* Philadelphia & Reading Co. (217 N. Y., 432)	31, 32
Beech *v.* Kerr Turbine Co., 243 Fed. Rep., 711	42
Buffalo Glass Co. *v.* Manufacturers' Glass Co., 142 Fed. Rep., 273	38
Buffalo Sandstone Brick Co. *v.* American Sandstone Machinery Co., 141 Fed. Rep., 211	41
Carpenter *v.* Westinghouse Air Brake Co., 32 Fed. Rep., 434	40
Chipman, Ltd. *v.* Jeffery Co., 251 U. S. 373	26
Cody Motors Company *v.* Warren Motors Car Co., 196 Fed. Rep., 254	38
Commercial Mutual Accident Co. *v.* Davis, 213 U. S., 245	29
Connecticut Mutual Life Insurance Co. *v.* Spratley, 172 U. S., 620	29
Craig *v.* Welch Motor Car Co., 165 Fed. Rep., 554	39
Dollar Co. *v.* Canadian Car & Foundry Co., 220 N. Y., 270	31
Golden, Belknap & Schwartz *v.* Connorsville Wheel Co., 252 Fed. Rep., 904	41
Goldey *v.* Morning News, 156 U. S., 518	20, 24
Good Hope *v.* Railway Barb Wire Fencing Co., 22 Fed. Rep., 635	21, 40
Green *v.* Chicago, Burlington & Quincy Railroad, 205 U. S., 530	25, 28, 35
Henry M. Day & Co., Inc. *v.* Shiff-Lang & Co., U. S. Dist. Court, Southern Dist. of New York, N. Y. Law Journal, Nov. 21, 1921	33
Holzer *v.* Dodge, 233 N. Y., 216	36
Hoyt *v.* Ogden & Portland Cement Co., 185 Fed. Rep., 189	40
International Harvester Co. *v.* Kentucky, 234 U. S., 579	26, 33
Louden Machinery Co. *v.* American Malleable Iron Co., 127 Fed. Rep., 1008	39
Lumberman's Insurance Co. *v.* Meyer, 197 U. S., 407	30
Noel Construction Co. *v.* George W. Smith & Co., 193 Fed. Rep., 492	37
Ostrander *v.* Deerfield Lumber Co., 206 Fed. Rep., 540	40, 42
Philadelphia & Reading Railway *v.* McKibben, 243 U. S., 264	24, 35
Peoples Tobacco Co. *v.* American Tobacco Co., 246 U. S., 79	25
Peterson *v.* Chicago Rock Island Pacific Railway, 205 U. S., 364	25
Pomeroy *v.* Hocking Valley Railroad, 218 N. Y., 530	36
Pope *v.* Terra Haute Mfg. Co., 87 N. Y., 137	21, 23, 31, 32

PAGE

Riverside and Dan River Cotton Mills *v.* Menafee, 237 U. S., 189 31
Seaboard Fruit Distributors *v.* Carleton Moore, Inc., 199 A. D., 612 36
Smith *v.* Lineweaver, 152 Fed. Rep., 730 39
St. Louis S. W. Railway *v.* Alexander, 227 U. S., 218 25
St. Louis Wire Mills Co. *v.* Construction Barb Wire Co., 32 Fed. Rep., 802 22
Tanza *v.* Susquehanna Coal Co., 220 N. Y., 259 ..... 32, 36
United States *v.* Bell Telephone Co., 29 Fed. Rep., 17 ..... 39, 42
Wilkins *v.* Queens City Bank & Trust Co., 154 Fed. Rep., 173 .. 39

IN THE

Supreme Court of the United States

No. 378

ROSENBERG BROS. & CO. INC.,
Plaintiff-in-Error,

AGAINST

CURTIS BROWN COMPANY,
Defendant-in-Error.

Statement of the Case.

This case presents the question as to whether service of summons on the President of the Curtis Brown Company, the defendant-in-error, an Oklahoma corporation, within the State of New York, constituted valid service of such summons, so as to give the court jurisdiction in a civil action, said summons having been served by delivery thereof to said President while temporarily within the State of New York (fol. 8 of Transcript).

The defendant is a corporation organized under the laws of the State of Oklahoma (fol. 8, Transcript of Record). The summons was served upon Curtis Brown, the president of the defendant, on the 3rd day of January, 1921 (fol. 9) in the City of New York. Thereafter

the defendant specially appeared in the action (fols. 5-11), and moved, according to the proper forms of practice in that State, to set aside the service of the summons (fols. 1 and 2) on the ground of the defendant being a foreign corporation, that is, that service upon its president in the State of New York was not valid under the Constitution of the United States (fol. 2) in that same did not constitute due process of law. The grounds are amplified and stated in detail in the motion papers (fols. 1-2-4 and 10). While said motion was pending undetermined in the State Court, and before the same came on for argument, the defendant petitioned the State Court to remove the action into the United States District Court for the Western District of New York (fols. 243-248) on the ground of diversity of citizenship, saving its rights in reference to the question of service (fols. 246-242). Such removal was accomplished, and an exemplified copy of the record was duly filed in the United States District Court (fols. 242-266-277). The motion, therefor, was never decided by the State Court. With the defendant's right thus preserved, the motion to set aside such service came on before the Hon. John R. Hazel, a Judge of said United States District Court, and the motion was granted. (See his opinion granting motion, fols. 253-257 and order granting motion, fols. 258-260-261.)

A certificate having been made under Section 238 of the Judicial Code to the effect that a jurisdictional question is involved (fols. 266-267-269) the case comes directly to this court on said certificate.

The motion to quash the service of the summons was based on the general proposition that the defendant was a corporation organized under the laws of the State of

Oklahoma, and since it was not doing business in the State of New York, service on Curtis Brown, its president, while casually within the jurisdiction, could not confer any right on the State Court or on the United States Court, to which the cause was removed, to enter any judgment against the defendant, and that any judgment so attempted to be entered, would be void for want of jurisdiction.

THE FACTS.

The facts show that this Oklahoma Corporation, at the time of service, was not doing and at no time prior thereto or subsequent thereto did business in the State of New York.

It was not claimed, and is not claimed here by plaintiff-in-error that this defendant corporation had any property within the State of New York, nor is it claimed that it had any office here or any regular or other place for the transaction of business within the State of New York at any time. None of its officers ever resided in the State of New York, nor did it ever file any certificate under any provision of the Corporation Laws of the State of New York to qualify it to transact business in said state, nor has it ever filed any designation anywhere authorizing the service of any process upon it or upon any of its officers or other person anywhere in the State of New York, nor has it done any act whatsoever to "domesticate" itself in that state (fols. 6, 8, 9, 10 and 240). It is engaged in the business of selling clothing and other men's articles at retail at Tulsa, Oklahoma, its home state, and it has no store or place

of business anywhere else (fols. 6, 7 and 9). It has no managing agent in the State of New York. In short, it is conceded that the corporation not only never had any property in the State of New York, but that its activities upon which jurisdiction is sought to be based, consist of having purchased goods in the State of New York—that is to say the proposition that is contended for by the plaintiff-in-error (as we understand it) is that this retail store, situated in the southwest, having sent here occasionally to buy goods, thereby subjected the corporation to the jurisdiction of the New York Courts on ordinary process, without any attachment of property or waiver or consent.

There is no attempt to show any carrying on of business at any time prior, or, for that matter, subsequent to the visit of the president on the occasion that he was served, January 3, 1921, except that it is pointed out in the affidavits of Mr. Strauss and the others who make affidavits for the plaintiff, that sometime in 1918 there was a conversation between Curtis Brown, the defendant's president and the representative of the plaintiff, at which it was tentatively arranged that for the purpose of sale at the store of the defendant at Tulsa, Oklahoma, the defendant should purchase, from time to time, clothing manufactured by plaintiff. Stress was laid on the fact that this conversation was had at Rochester, and within the confines of the State of New York, but this can hardly be called "doing business" in the State of New York. On the contrary, it was simply an arrangement for doing business at Tulsa. It is then pointed out that thereafter, from time to time, defendant ordered goods from the plaintiff, to be shipped to its place at Tulsa. This was given by written orders. No other business

was transacted in the State of New York. Plaintiff lays emphasis on the supposed fact that the goods were sometimes ordered F.O.B. Rochester (fol. 37), but it appears that that was the usual custom of the plaintiff, so that marking the invoice of the orders F.O.B. Rochester, has no special significance in relation to the question here to be discussed. It also is sworn to that Brown said that he made three or four trips a year to New York to buy goods. Be that as it may, and leaving out of consideration how much difference it makes whether goods are purchased by a foreign corporation by sending its buyer here to make the purchase or ordering them by mail, the fact is that there is no evidence in the record of a specific purchase prior to the trip in question. All this ceased, however, in the summer of 1920, when a controversy arose between them, which is the subject of this action (fols. 39, 40, 41, 10, 6). There is nothing in the record to disclose a general doing of business, prior to the date of the attempted service here, with that "permanence and continuity" that would have enabled the State Court or the United States District Court to take jurisdiction on the ground that the corporation is "here," or to say it was "found" here. To summarize this we say that where a corporation occasionally sends to this State a representative to make purchases, which representative leaves the State again from time to time, this does not constitute doing business within the State.

But it is claimed that the visit of Mr. Brown here, on the occasion of a New Year Holiday (fols. 7, 9, 10, 226, 236, 237, 239, 240) became, in some way, a business trip, and that therefore, service upon him was good. As we have intimated before, our position here is, that even if

Curtis Brown had come to New York on a buying trip, charged with instructions and authority, generally, to make purchases, such trip would not be sufficient to charge the corporation with "doing business." We will, however, now proceed to take up the details of this trip, and we will endeavor to demonstrate that what he did in New York did not constitute such doing business, even under the interpretation contended for by the plaintiff-in-error.

The affidavits of Curtis Brown, Mr. A. A. Brown, Mr. Shelton and Mr. Seidenbach, submitted in our behalf, show the following facts:

In the latter part of December, 1920, Curtis Brown, the president, left Tulsa for the purpose of making a business trip to Chicago and Milwaukee (fols. 7, 9, 226, 236, 239). He seemed to have made some sort of a tentative promese (fol. 6) to Leslie Seidenbach, his friend, and also a stockholder in the company (fols. 5-6), to meet him in New York and spend New Year's with him there (fol. 226). His affidavit (fol. 10) and that of Mr. A. A. Brown, the vice-president (fols. 236-237) and Claude Shelton, the secretary of the company (fol. 239) both of them directors, shows that absolutely no arrangements were made by the corporation or any of its officers, for Mr. Brown to make any business trip to New York on that occasion and they did not even know that he was going to New York (fols. 241-237). On the contrary, the affidavits show that the practice of the corporation usually was to have a representative go to New York in the latter part of January or in February, *and not the early part of January* (fols. 233, 236, 240). That before such a trip is begun, an account is taken of

stock, and the officers determine what goods they have on hand (fols. 233, 237, 239) and the nature and the extent of the purchases to be made, and, as Claude Shelton puts it in his affidavit "none of the preliminary things had been done which it was the practice of said corporation to have done before sending a representative to New York to purchase goods" (fol. 239) and they also state that they did not even know that Brown intended to go to New York or that he would be in New York on that trip, and that a New York trip was not contemplated, and no buying instructions were given, and no lists prepared, and they say that he was in New York wholly on his own initiative, and "without authority or direction or consent of the corporation or its officers," nor was he given any memorandum to work on, or any instructions (fols. 240, 237, 238). This is not disputed, and cannot be disputed, and it may be said in passing on this point, that it is obvious that Mr. Brown's trip to New York could not have been a buying trip for the company, when we consider the small amount of the purchases.

On the morning of the 3rd day of January, 1921, *and before he had visited any of the concerns whose depositions have been taken in this case*, he went up to the New York office *of the plaintiff-in-eror*, on a visit of "personal courtesy" to Mr. Brickner, connected with that firm. He bought no goods there, however, but while with him, chatting on various general topics, and without any business on his mind, they saw fit to take advantage of this visit of courtesy, to have the office boy serve a summons on him (fols. 234-235). On the morning of January 3rd, when this summons was served, he had not transacted any business of the company *because the four alleged visits to other places claimed to constitute doing business were done on the 4th and 5th of January, as*

appears by the affidavits and depositions submitted by the plaintiff itself (fols. 155-88-9). In short, the service could not be justified by anything that occurred up to the moment that the summons was served, and if Brown had left the city of New York at that time, immediately after being served this service could not be defended. But it is claimed by plaintiff that what he SUBSEQUENTLY did, in visiting the four concerns, has converted a service, void at the time it was made, into a valid act. The point is made, as we understand it, that although it must be uncontradicted on this record that Brown had no mission in New York for his company at that time, and was here, casually, on a pleasure trip with his friend Mr. Seidenbach, to spend New Year's Day in New York, his subsequent, voluntary acts not previously authorized, converted this into an official representation of the corporation in New York, so that the volume or cumulative effect of his acts, binds the corporation to a service *invalid at the precise time it was made.*

Our position, of course, is that the acts of the president, while on this trip, no matter what they were, could not establish the claim that the corporation was doing business in New York, as the trip was a casual one by the president, but we nevertheless present herewith the following analysis of the things that the president did *after he was served,* which have been relied upon by the plaintiff-in-error to prove jurisdiction.

The acts which are claimed to be the transaction of business by Curtis Brown for his corporation, include visits to the following concerns in New York City:

A. Mark Cross & Co.
B. Blum & Koch
C. Bill & Caldwell
D. Crofut & Knapp.

We now take these up in detail.

A.

The visit to Mark Cross & Co. was for a purely personal purpose.

It seems that the Yuletide spirit prompted Mr Brown to buy a purse for his wife and a leather brief case for Mr. Seidenbach, his friend, as gifts; (fol. 228) so he went to the retail department of Mark Cross & Co., a large concern in New York that deals in all kinds of novelties, including leather goods. Now Curtis Brown Company, the defendant, sometimes buys goods at wholesale from Mark Cross & Co., (fols. 228-215) and naturally has a line of credit there. So Mr. Brown went into the retail department, and made a selection (fols. 215, 216, 217, 218, 219, 210, 212), and after having made a selection of a purse and brief case, in order to get the benefit of the wholesale courtesy discount of 20%, he announced who he was, and asked that the bill be charged to the Curtis Brown Company, (fols. 211-216) which request was complied with. He immediately delivered his gift to Seidenbach at New York, and when he got back to Tulsa he gave the purse to his wife. This was obviously a personal purchase only, as the purchases for the firm run into the thousands (fol. 211). He did not go to the wholesale department of Mark Cross (fol. 228), and he avers, circumstantially, that the purchase was not made or intended for the defendant company, and points out that when he does make purchases for the defendant from Mark Cross Co. they are always in quantities at wholesale (fol. 229). A reading of the affidavit of John P. Ahrens, salesman of the Mark Cross Co. (fol. 211) and the affidavit of Miss Donovan, clerk in the wholesale department, claimed to support plaintiff's case, so far

from contradicting these facts, confirm them. They allowed him a courtesy discount of 20% in this retail department because he was a buyer in the wholesale department (fols. 217-218). IT IS OBVIOUS THAT THIS VISIT TO THE MARK CROSS STORE TO BUY THESE PERSONAL GIFTS FOR HIS WIFE AND FRIEND, DOES NOT CONTRIBUTE TO THE CLAIM OF THE OFFICIAL PRESENCE OF THE CORPORATION HERE DOING BUSINESS.

B.

The visit to Blum & Koch did not constitute the transaction of any business by the company or for the company.

Mr. Brown called on Blum & Koch for the purpose of making a social call (fol. 229) and chatting upon matters of general interest in the trade, (fol. 229) and without any purpose or intent of buying goods or transacting any business, *and he did not transact any business while he was there.* All he did was that he saw an ornamental calendar, which attracted his attention, and asked for one, which they later mailed to him, evidently as a gift (fols. 229-167). They are in the hat business. It seems that sometime previously, about the middle of December, Blum & Koch sent out a general circular letter to all their customers, revising their prices downward, and fixing the revised prices and advising the customer that unless they heard otherwise from the customer by January 10th, the revision of prices would become effective (fols. 229-167-204). He was there only five minutes (fol. 204). While there, a Mr. Richold mentioned to Mr. Brown that the reductions had been made, and Brown

expressed his satisfaction that that had been done. It is stated in K.14—letter of December 20, 1920, as follows:

> "Unless you otherwise inform us by January 10th, it is absolutely understood that the order you have placed with us for spring delivery is entirely satisfactory, and shipment will be made as instructed, at the reduced price."

Considerable correspondence passed between the parties in the latter part of 1920, and up to February, 1921, on the subject of cancellation and revision of prices, and the letter of December 27th indicates that a letter was written by the Curtis Brown Company to the effect that Brown would call on Koch sometime in January. Assuming that this social visit can be construed as a compliance with that promise to call, it clearly does not change the situation in the least, because evidently the promise made on December 21st to call was made unnecessary; at least it made the "transaction of business" unnecessary by reason of the circular letter revising prices (see K.14—letter of December 17, 1921, fols. 191 and 175, 186 and 184. These folio references show that the entire question of adjustment of prices had been completely disposed of by correspondence. See fols. 229, 230), and he was not sent to New York on that occasion on any such mission, and there was no business to transact then and there. *In no sense can the social chat at Blum & Koch be converted into the fiction of an official representation of the Company in New York on its business.* The depositions of Mr. Lask and of Mr. Richold confirm all this (fols. 163, 164, 167, 169, 172, 202, 203 and 204) and are not in contradiction thereof. He

does not know of any change of conditions set down in his letter of December 17th revising prices. Mr. Richold is the secretary and treasurer of Blum & Koch. Richold looked upon it as a social visit (fol. 202).

C.

The call on Bill & Caldwell for the prime purpose of making a friendly inquiry concerning the then recent illness of Mr. Hazelton was not converted into an official representation of the corporation, notwithstanding the casual selection of reduced merchandise subsequently confirmed from outside of the State of New York.

The visit of Mr. Brown to Bill & Caldwell subsequent to the service of the summons, cannot be made the basis of a claim for doing business on January 3, 1921, no matter what was later accomplished on such visit. However, the following facts are referred to the attention of the court, which we think will show that in no sense can the things done by Brown at Bill & Caldwell's on January 4th convert Brown's pleasure trip, by relation back, into an "official representation of the corporation at Bill & Caldwell's on January 3, 1921."

Brown had been freindly with Mr. Hazleton, one of Bill & Caldwell's salesmen, for a number of years (fol. 230). Hazelton had been ill for some time, and had missed his usual trips to Tulsa to sell goods, and so, on this occasion, Brown called on Bill & Caldwell for the purpose of finding out about Hazelton (fols. 230, 88, 70). He first met Mr. Whitelaw (fol. 78) *who is not a salesman but a financial man in the firm* (fols. 230-88)

and he distinctly stated he was not on a buying trip (fols. 102, 230, 71, 80). While talking with Whitelaw, Mr. Bill came into the conversation, and after half an hour's social and general talk, without any reference to purchases other than he was not there on a buying trip at the time, Mr. Bill pressed Brown for the purchases of a bargain in hats (fols. 230, 102, 71, 75, 79). Yielding to his salesman's eloquence, he made a tentative selection, on which he made a confirmation later when he got out to Tulsa (fols. 82, 81, 101, 103, 104). The testimony of Mr. Bill, and the financial man, Mr. Whitelaw, read in opposition to this motion, serves but to corroborate all this (fols. 68 to 85 and fols. 88 to 104). Therefore, no business was transacted in the sense of anything legally binding being accomplished, but it was simply in the realm of talk. The outcrop of the conversation that began originally with an inquiry concerning Hazleton, and then drifting on to general business conditions, and then to a solicitation by Mr. Bill to have Mr. Brown select something for the corporation, did not bring the corporation "here." Bill quotes Brown as saying: "I am not interested in buying merchandise, but will be in two or three weeks later to buy spring goods."

It is impossible, in these two depositions, to spell out a case of official representation. No doctrine of adoption or ratification can be introduced. The question is not one of contract. The question is whether the fiction arose of a western corporation being here for the time being, on January 3, 1921, the day service was made, and if they were not here in a legal sense the subsequent confirmation or ratification or adoption at Tulsa, Okla., of an act done by the president, while it may make them liable on the contract, does not, by relation back, ratify

a service of the summons which, at that time, was illegal and void. The right to serve this sumnrons on Curtis Brown depended on whether the facts existed on January 3rd that justified handing the paper to him and this question must be answered in the negative. The trip to Bill & Caldwell was in no sense an official representation of the corporation.

D.

The visit to Crofut & Knapp, for the prime purpose of keeping up personal, friendly relations with Mr. Holmes, was not converted into an official representation of the corporation, although a tentative selection of an insignificant purchase was made and subsequently confirmed by mail.

The Crufut & Knapp visit is of no greater value to plaintiff that the Bill & Caldwell visit. The cumulative effect of the two can no more establish the doing of business than the cumulative effect of zero and zero can make something out of nothing. It seems that the Curtis Brown Company decided not to have any further business relations with Corfut & Knapp (fol. 231). But Mr. Brown, desiring to continue personal, friendly relations with Mr. Holmes (fol. 231) called there two days after the summons was served, having the leisure to do so. After having a conversation with Holmes, Burns, a salesman there, got hold of Brown and tried to sell him what is known as "floor hats" (fols. 138, 139, 147, 148)—floor hats meaning cheap hats, or something else than first-class merchandise. They were offered at a very low price, and Brown took the matter into con-

sideration, not knowing whether the defendant corporation needed the merchandise. After returning to Tulsa, he took the matter up with his associates (fol. 129) and sent a confirmation, which, however, was not accepted because it differed from the original terms (fols. 133-134) and the result was a rejection of the order, and then, some two weeks later, they did get together on terms, all being done by mail or telegram, (see Exhibits at fol. 153 and especially 155, declining to ship the order, fol. 156). *He did not go to Crofut & Knapp with the intention of buying goods, but for the purpose of having friendly relations with Holmes.* The depositions produced by the plaintiff, in opposition to this motion, confirm all this, two days after the summons was served. His inquiry was not for salesman Burns, but for friend Holmes, and they sent for Holmes, who was in an office across the street, and there, after Brown got through talking with Holmes, Salesman Burns got after him and tried to interest him in these cancelled hats, which were at the factory at Norwalk, Conn. (fols. 231-232). There was no confirmation at that time by Brown, or anything like an order or a legal, binding contract of any kind, but later Brown sent a so-called confirmation by telegram, but which was not satisfactory because it did not square with the terms that had been offered by Burns, and really amounted, in law, to a counter proposition. Finally, after a lapse of about ten days a contract was entered into from Tulsa.

Summary of the Discussion of Facts.

The effect of the depositions of J. Leslie Seidenbach, a large stockholder in the corporation (fol. 4), but who

is not a director or officer, Arthur A. Brown, director and vice-president of the company (fol. 236) and Claridge Shelton, secretary and director of the company, establishes, therefor, that Curtis Brown, the president, had been sent by the company to Chicago on some business, but had not been authorized to go to New York; that his trip to New York was an afterthought for the purpose of spending New Year's Eve there, and that while there he made a personal purchase at Mark Cross & Co. He called at Blum & Koch for a friendly visit without any business on his mind. That his prime purpose in coming to Bill & Caldwell was to inquire about his friend Hazelton, and that his visit to Crofut & Knapp was to keep up friendly relations with Mr. Holmes, in view of the fact that between him and that firm his relations were strained in consequence of previous business transactions which had now ceased. As to the Mark Cross visit and the visit to Blum & Koch, of course nothing can, by any stretch of the imagination, be made out of them to support the contentions of the plaintiff-in-error, and we have, therefore, left only the incidental purchase of so-called bargains, tentatively selected at Crofut & Knapp and Bill & Caldwells, which, however, were only confirmed from Tulsa, Okla., and obviously could not have bound the company without such confirmation from the home office under the circumstances disclosed in this case.

Argument.

The argument on the law applicable to the facts here disclosed will be presented in parts as follows:

PART I.

The rule is firmly established that the phrase "doing business' in relation to the service of process means an established carrying on of business in the jurisdiction of service, and the contention that a temporary visit of an officer, even though on business of the corporation, gives jurisdiction, has never been adopted by this court.

Fundamentally, a corporation, as the creature of the sovereign that created it, is amenable only to that sovereign, and in fiction of law, it originally could not go outside of the jurisdiction of that sovereign. It was non-existent outside of the political boundaries of its creator. Exceptions in time grew up. These exceptions, in general, are now that jurisdiction may be obtained over a corporation by a sovereign other than that which created it, if the corporation brings its property or part of it into such foreign jurisdiction. Its property may be attached and held to answer the judgments of such foreign court. Then again if it establishes itself in business there, it is said to be "there" and the process of the local courts can operate upon it. It may also, by waiver or consent, submit itself to such foreign jurisdiction. The courts have avoided any attempt at a precise definition of what amounts to an establishment of a corporation's business in a foreign jurisdiction. But it is clear that a temporary casual enterprise, having no permanence or continuity, does not bring the foreign corporation into a foreign place. Certainly the wanderings of the officers have no such effect.

In the case at bar, we have a corporation at Oklahoma conducting a small retail clothing store in the City of

Tulsa. It has no activities anywhere else—no headquarters—no establishment of any kind. Like most concerns in this country dealing in wearing apparel, it comes to the New York market ocassionally to purchase. The defendant-in-error contends that coming here to buy goods does not constitute doing business here. It simply means that the goods are bought here (or perhaps only selected here) for the purpose of enabling the corporation to do business at Tulsa, Okla. If the contention of the plaintiff-in-error in this regard is to be sustained, then a corporation would be amenable to process in every place in the United States where it happened to find it necessary or desirable or useful, for the purpose of its business, to make a purchase. We do not think that any such doctrine has ever been adopted by this court.

The decision, therefore, of Judge Hazel, was right (fols. 253-257) because this corporation is not established in business in New York State.

PART II.

The acts done by Brown, the President, while here, did not constitute doing business, even within those decisions of subordinate jurisdictions that hold that the temporary visit of an officer of a corporation on business of the corporation, confers jurisdiction.

As we read the brief of the learned counsel for the plaintiff-in-error, he does not attempt to make out any case of established business. Indeed it would be impossible to do that under the facts disclosed by his record, but attempts to uphold the service by claiming that

Brown, the president, came here to transact business for the corporation and while here actually did transact such business.

The proofs utterly fail to sustain any such claim. Even were the point good in law, it is established, beyond peradventure, that none of the other directors and officers of this company authorized Brown to make this particular trip to New York City. The statement was made in the brief that Mr. Brown owns all the stock of the defendant corporation and in some way it is worked out that this supposed fact carried the corporation with him. In short that he, being the sole stockholder, everything he did constituted the continuous ratification of an act done by him as soon as completed. In the first place it appears by the affidavit of Mr. Seidenbach (fol. 6) that Seidenbach was a large stockholder in the corporation at the time of service, and the assertion, therefore, that Brown owned all the stock is not sustained by the record. Furthermore on a motion of this kind the stockholdings in the corporation are immaterial. These other officers and this additional stockholder Seidenbach have all deposed that this trip was not authorized and point out that the trips made by Brown to purchase goods are made at other seasons of the year, and that for such trips he is previously authorized, as a result of a business consultation by all the members of the corporation and he is given a regular buying requisition and a list of houses is made up that he is to call on to make purchases. Nothing like this appears on this visit. On the contrary having finished his business in Chicago he came to New York for a pleasure trip. Having completed the New Year's celebration and before visiting the four concerns men-

tioned in the evidence, he was served with the summons. SUCH SERVICE WAS VOID AT THE TIME IT WAS MADE, FOR AT THAT TIME THE FACTS DID NOT EXIST THAT JUSTIFIED SUCH SERVICE.

PART III.

Discussion of Cases in United States Supreme Court.

Goldey v. *Morning News*, 156 U. S., 518.

This case came up from the Eastern District of New York in 1895. After pointing out that there was a difference of opinion between the courts of New York State and the Circuit Court of the United States on the validity of such service, the Court proceeds to determine the point and says at page 521:

> "A judgment rendered in a court of one state against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity * * * unless service of process was made * * * upon an agent appointed to act there for the corporation * * * and not merely upon an officer or agent residing in another state and only casually within the state and not charged with any business of the corporation there."

The value of this decision in respect of the contention of plaintiff, that the acts of Mr. Brown constituted such doing of business, will be appreciated by examining the opinion in the *Goldey* case in the Court below, 42 Fed. Rep., 112, decided 1890. The brief opinion by Judge Lacombe there refers to and is based upon the case of *Good Hope* v. *The Railway Barb Fencing Co.*, 22 Fed. Rep., 635, the Judge saying:

> "That decision determines the question raised here."

Turning to the *Good Hope* case, we find that the Court held that a foreign corporation is *not found* within a district for the purpose of service of process, when its president comes temporarily into such district *upon the business of the corporation*, such corporation having no office or place of business therein. The question was directly involved there. The Court saying:

> "The corporation has no office or place of business within this state and is not engaged in business here *except that it has made occasionally a purchase of goods by sending an agent here for that purpose.* Its president came here to adjust a controversy between it and the plaintiff, growing out of such a purchase, and it was then served with the summons in this action."

After quoting the condemnation of the doctrine of *Pope* v. *Terre Haute Car Co.*, 87 N. Y., 137, by the New Jersey Courts, the opinion continues:

> "It is quite clear that service of process upon an agent of a foreign corporation while merely casually present within the state, is not equivalent to a personal service * * * and such a judgment would be treated as void * * *."

And after quoting *St. Clair* v. *Cox*, 106 U. S., 350, as sustaining the doctrine, the opinion further continues:

> "In this case, the president of the defendant was here in his representative character, but the corporation had never been practically engaged in business here. It made purchases here occasionally, but it could have made them by correspondence as well as by the presence of its agent here. *If the purchases had been made by correspondence, it could be as logically urged that the cor-*

> *poration was engaged in business here as it can be now.* Instead of writing, its agent came here in person. As it has never kept an office here or carried on any part of its business operations here, or been engaged in any business here * * * it was not found here for the purpose of being sued. Motion to vacate is granted." (Italics are ours.)

It will be seen, therefore, that the basis of the decision of the *Goldey* v. *Morning News* case, is that a corporation cannot be served under the circumstances stated, unless the corporation is engaged in business here, and where the president or other agent so served, is not generally engaged in business here, but is actually here, although frequently for the purpose of making purchases with the authority and consent of the corporation, no jurisdiction is obtained.

St. Clair v. *Cox*, 106 U. S., 350.

In this case it was stated that it must appear as a *part of the record of the service* that the corporation was doing business within the state.

After a historical review of the question, the decision says, at page 357:

> "They do not sanction service upon an officer who resides in another state and is only casually in the state * * *."

Then after pointing out that the corporation can be bound by the service upon the Treasurer only if he was, at the time of the service, acting as an official in a manner impersonating the company, the court continues:

> "This representation implies that the corporation does business or has business in the state *for the transaction of which it sends or appoints an agent there.*"

Then follows a quotation of the condemnation of the case of *Pope* v. *Terre Haute* by the Jersey Court above referred to.

No decision of this court has as yet sanctioned the doctrine that a foreign corporation could be deemed to be in the state of service because of the casual, occasional presence of the officer served, even on business of the corporation. It has limited itself to sustaining service in those cases where the foreign corporation was established in the state of service independently of whether the officer served was in the state of service or not. In short in every case the corporation is established there *prior to the service.* The effort made in the brief of the learned counsel for the plaintiff-in-error to spell out permanence and continuity because the president previous to the date of service, made occasional trips to purchase goods, will not bear analysis. The corporation purchased goods from the plaintiff-in-error each year or probably each season just because it wanted to. There was no permanent arrangement—no contract—the defendant-in-error had no interest of any kind in the state—it simply SENT HERE to purchase goods instead of or possibly in addition to ordering them by mail, telegraph or telephone. There is no case where service was sustained just because the corporation periodically or even with great frequency purchased goods in the state of service. In each case where this question arose the point was decided adversely to the plaintiff-in-error.

Philadelphia & Reading Railway v. *McKibben*, 243 U. S., 264, decided March, 1917. Here defendant corporation, although operating no railroad in the state of service, and having no dock or freight or passenger ticket office therein, nevertheless did have arrangements in the state of service under which its tickets could be sold by the agents of the connecting carriers, the defendant subsequently receiving its share of the price obtained for the freight or passenger haul over its own line. The name of the defendant was displayed and was in the telephone book and the business could be transacted with it through its connecting carriers in the usual way. Nevertheless this court held that this was not doing business in this state. It is said that even the hiring of an office, the employment of a district freight and passenger agent, having under him clerks and other agents, was not doing business, and quoted, in support of this, *Green* v. *Chicago, Burlington & Quincy Railroad*, 205 U. S., 530.

In *Peoples Tobacco Co.* v. *American Tobacco Co.*, 246 U. S., 79 (decided March, 1918, error from Louisiana), it was held that the fact that a foreign corporation practices advertising its wares in the state of service and sending into it its agents to collect money or extend credit and solicit orders of the retail trade to be turned over to local jobbers (located in the state of service) to whom the corporation sells its goods, did not constitute the doing of business so as to validate the service on an officer there. The court say at page 87:

> "We think that the previous decisions of this court have settled the law to be that such practice did not amount to that doing of business which subjects the corporation to the local juris-

diction for the purpose of service of process upon it."

Peterson v. *Chicago, Rock Island, Pacific Railway,* 205 U. S., 364, holds that foreign corporations can be served with process in the state only when doing business therein, and such service must be upon an agent who represents the corporation in such business.

St. Louis S. W. Railway v. *Alexander,* 227 U. S., 218, decided February, 1913. In this case (which is quoted in the brief of the plaintiff-in-error), the facts are clearly distinguishable from the case at bar. The service was upheld, but it was shown that the defendant, a railway company, had an office in the City of New York, giving the name under which it jointly, with another company, was known. It used this office to have its agents established there, attend to claims, presented for settlement, and it was held that it was carrying on business there to such an extent as to make it amenable to process under the law of that state. The situation there is quite different from here, where the president merely makes temporary visits.

In *Chapman, Ltd.* v. *Jeffery Co.,* 251 U. S., 373, decided January, 1920, the corporation had appointed an agent, pursuant to the Statute, upon whom process could be served. This statute provided that if the corporation desired to do business in the State, it must obtain a license and designate such a person to receive process. The corporation removed from the State, but had not revoked the designation of the person upon whom to make the service; held that the service on such a person was not good, as jurisdiction depended upon

the continued presence of the corporation within the State.

International Harvester Co. v. *Kentucky*, 234 U. S., 579, decided June, 1914. The learned counsel for the plaintiff-in-error seems to rely greatly on this case, but it is difficult to see how any analogy can be drawn between the facts of that case and of the case at bar. Here the service is sought to be sustained without any attempt to show that this corporation was established in business here, but the jurisdiction is sought to be sustained solely because on previous occasions each one wholly disconnected with the other, this officer came here to purchase goods so that the corporation could carry on its business in Oklahoma, and that this officer, on this trip, temporary in its character, made a purchase or two. This is quite different from the facts in the case cited. It is said at p. 583:

> "For some purpose, a corporation is deemed to be a resident of the State of its creation, but when a corporation of one State goes into another in order to be regarded as within the latter it must be authorized to transact this business in that State. The mere presence of an agent upon personal affairs does not carry the corporation into the foreign State. It has been frequently held by this court *and it can no longer be doubted* that this is essential to the rendition of a personal judgment that the corporation be doing business within the state (quoting *St. Louis Railway* v. *Alexander, supra*)."

As was said in that case "each case must depend upon its own facts and their consideration must show that this essential requirement of jurisdiction has been

complied with and that the corporation is actually doing business within the State." There then follows in this opinion a statement of the activities of the company in Kentucky, gleaned, largely, from a circular that was sent to its agents containing instructions obviously designed to evade the consequence of "doing business" in the State. The court concludes as follows (p. 585):

> "Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the harvester company were delivered in the State of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucy, but might there receive payment in money, checks or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected at any bank in Kentucky. This course of conduct of authorized agents within the state, in our judgment, constituted a doing of business there in such wise that the harvester company might be fairly said to have been there doing business and amenable to the process of the courts of the state."

The court then analyzes its own opinion in the case of *Green* v. *Chicago, Burlington and Quincy Railroad*, 205 U. S., 79 (decided March, 1918, error from Louisiana), and it points out that in that case a railroad company, carrying on no business in Pennsylvania other than that hereinafter mentioned, was sought to be held liable by service on one Heller who was described as an agent of the corporation. It employed Heller for the purpose of soliciting freight and passenger traffic in Philadelphia, where he was known as a district freight and passenger agent. He had clerks and passenger

agents and freight agents who reported to him. He accepted money from those desiring to purchase tickets, etc. He received exchanged bills of lading from shippers for their convenience, and it is pointed out that Mr. Justice Moody said at p. 533:

> "The business shown in this case was in substance nothing more than that of solicitation."

It will be seen from a comparison of these two decisions that the distinction to be observed is that service is good if the corporation is established in business in the state of service, carrying on there the purpose of its existence, but that if the seat of the activity of the corporation is not in the state of service, but temporary visits are made for the purpose of carrying on its business in its home state, even though those temporary visits may be frequent or made with regularity or even in accordance with a pre-conceived plan, this does not constitute doing business in the state of service. To hold that it does would lead to the doctrine that on every occasion that a corporation finds it necessary to send a representative to another state for a purely transient purpose, it submits itself to the process of that state. This is wholly repugnant to the principles that have developed the fiction of a corporation under certain circumstances having life and existence outside of the boundaries of the jurisdiction of the sovereign whose creature it is.

Commercial Mutual Accident Co. v. *Davis*, 213 U. S., 245, decided April, 1909. In this case the Missouri Statute provided that process could be served on a foreign insurance corporation by delivering same to any person who was authorized by the company to collect

premiums or to adjust controversies, etc. Such service was made, but it was conceded that constitutionally such service would not be good to hold the corporation, unless, in addition thereto, it appeared that at the time of service, the corporation was actually doing business in the state. Without a showing of such doing business, the service would have failed as being short of due process of law. An examination of the testimony taken, however, discloses that the company had a number of insurance policies outstanding in the state. It collected premiums thereon. It examined the bodies of the deceased. In short it was found that the company was established in business in Missouri.

Connecticut Mutual Life Insurance Co. v. *Spratley*, 172 U. S., 620, January 1899. The principle of this case is the same as that last discussed. There service on a foreign insurance company was sustained only because it was shown that the company continued its old policies in force in the state, even though it wrote no new ones.

Lumbermen's Insurance Co. v. *Meyer*, 197 U. S., 407, decided April 1905. There the question again was whether the fire insurance company sought to be held to service was doing business in the state. It was held that it was, but such finding was based upon the following facts (from p. 414):

> "Nearly one-third of the amount of its total fire risks was in that state (state of service) when these policies were issued and when the losses occurred * * *. The contract was an insurance policy issued upon real estate and machinery in a building situated in the City of New York * * *. The provisions of the contract clearly contemplate the presence of an agent of the company at

the place of the loss after it has occurred for the purpose of determining its extent, etc., * * *."

There is a great deal more to show that it was intended that the corporation should do business in New York. There was considerable discussion, also, as to whether the cause of action arose in New York. In this action we have to point out that while it is claimed here (but not conceded by the defendant-in-error) that the method of selling goods on previous visits was F.O.B., it is plain that whether they were sold F.O.B. or not, they were not intended for use or sale in New York, but were intended to be sold at the place of business of the defendant-in-error at Tulsa., Okla., and for no other purpose.

And as to the two alleged purchases at Bill & Caldwell's and Crofut & Knapp on the visits during which the service was made, those contracts clearly, if contracts they were, were not made in New York but only sprang into being when they were confirmed from Tulsa and they, too, were for the sole purpose of re-sale at Tulsa, Okla., and nowhere else.

PART IV.

New York Authorities.

At first the New York Courts were inclined to take jurisdiction, so long as an executive officer was served here.

Pope v. *Terra Haute Mfg. Co.*, 87 N. Y,. 137.

This decision, however, was overruled by the case of *Riverside and Dan River Cotton Mills* v. *Menafee*, 237

U. S., 189, and the Court of Appeals of our state deferred thereto.

Bagdon v. *Philadelphia & Reading Co.*, 217 N. Y., 432. In this case a person had been designated, under Sec. 16 of the General Corporation Law of New York, as a person upon whom process may be served, and the defendant conceded that it was engaged in business in New York. That case must be read in connection with the case of *Dollar Co.* v. *The Canadian Car & Foundry Co.*, 220 N. Y., 270. That case considered the effect of Sub. I of Sec. 432 of the Code of Civil Procedure, providing for personal service upon an officer of a foreign corporation. That section provides as follows:

> "Personal service of the summons upon a defendant being a foreign corporation, must be made by delivering a copy thereof within the state as follows:
>
> 1. To the president, vice-president, treasurer, secretary or assistant secretary, etc."

The Statute was held to be constitutional in that the Statute did not, in express terms, purport to authorize service upon a foreign corporation not doing business here, simply because it might be possible to find one of its officers temporarily within the state. It is said at p. 275:

> "It is more rational to assume that the legislature intended to point out the details of method by which service might be made, where it was constitutionally possible to make service than that it was attempting to provide for service upon corporations which could not thus legally be brought within the jurisdiction of our courts and where service, if in form made, would be in vain."

Then, after referring to *Pope* v. *The Terra Haute Mfg. Co.*, 87 N. Y., 137, it is said at p. 277:

> "Subsequently the Supreme Court of the United States disgreed with the views of this court * * *. This court, as was its duty in respect of such a question, yielded to the views of the Supreme Court."
>
> *Bagden* v. *Philadelphia & Reading Railroad*, 217 N. Y., 432.

Thus a constitutional interpretation has been established, different than that which was entertained by the court when the *Pope* case was decided.

In *Tanza* v. *The Susquehanna Coal Co.*, 220 N. Y., 259, the New York courts adopted the rule definitely and unequivocally that to sustain a service of that kind it is necessary that the corporation should be here and that the corporation is NOT here, where the only evidence thereof is a casual trip here by an officer. In that case service was sustained, but it was sustained because, as the facts recited in the opinion show, the defendant had a branch office in New York in charge of one Peterson, described as a sales agent, who had eight salesmen under him subject to his orders. A suite of offices was maintained in the Equitable Building in New York City, which was the headquarters of the said sales agent and his subordinates. There was a sign on the door giving the name of the defendant, and in addition to the salesmen, there were other employees such as stenographers and clerks. The salesmen met there daily to receive their instructions. A bank account was kept in New York. Small payments of salaries and petty disbursements were made therefrom. This the court held was an established course of business.

The court considers the case identical as to facts with that of the *International Harvester Co.* v. *Kentucky*, 234 U. S., 579, and it is then said at p. 267:

> "If, in fact, it is here—if it is here not occasionally or casually, but with a fair measure of permanence and continuity, then whether its business is interstate or local, it is within the jurisdiction of our courts."

And again at p. 268:

> "Unless a foreign corporation is engaged within the state, it is not brought within the state by the presence of its agents."

In the case of *Henry M. Day & Co., Inc.* v. *Shiff-Lang & Co.*, in the U. S. District Court, Southern District, October, 1921, the situation, as it existed in the State Courts, is commented upon by Hough, *Circuit Judge*. This case is reported in the *New York Law Journal*, 1st, page, for Nov. 21, 1921.

We give the following extracts from his opinion:

> "While in New York City, this officer also visited firms or places of business other than that of the recalcitrant customer, and of Day, he doubtless would have been glad to pick up any other business that he could, but it is plain that the requirement of the above referred to canned fruit was a sufficient reason and the reason for his visit to the city. The ordinary indicia of doing business in any given locality are all lacking in respect of defendant's activities in New York. It has no office here, no agent, no salesmen. Of course it had never taken out any license to do business in this state * * *. (*Tauza* v. *Susquehanna*, 220 N. Y., 259) is not the last word from

the Court of Appeals of New York. The process of receding from the doctrine of *Pope* v. *Terra Haute Car Co.*, is still going on. * * * In other words the rules for good or bad service of the summons, in even a removed case, is something to be passed on in accordance with the decisions of the U. S. Courts, and not those of the state wherein service is made * * *. On the subject of service of process, it has been consistently held in this Circuit that occasional, sporadic or single pecuniary transactions by foreign corporations in a given locality do not constitute doing business within the rule as to service of process, for that rule declares that the essential thing is that the corporation shall have come into the state (citing *Shipman* v. *Jeffery*, at p. 379) * * *. Every case stands on its own facts, but one point may be asserted positively, namely that even the president of a corporation which does not do business in a given locality does not carry his corporation around under his hat * * *. One must be able to say that a foreign corporation is doing business in New York, when every officer, agent or servant of that corporation is outside of the state, before it can be said to be doing business in the same state when the president comes to town to settle some point with a correspondent. Any other view, would, as has been well said, subject almost every incorporated concern doing a large business, to suit all over the country, unless all that corporation's officials religiously stayed at home. It follows that the question may be put this way: Was Shiff's Company doing business in New York before any representative of it came into the state? It was not, unless one thinks that every New Yorker who orders goods from California is thereby doing business in California. In a certain sense he is doing business by the act mentioned, but not in the legal sense, nor for purpose of service upon corporations within the case cited."

The report of E. Henry Lacombe, Special Master, referred to in the preceding opinion, appears on the first page of the *New York Law Journal* of Thursday, August 25, 1921, and we do not know that it is reported elsewhere. It is an exhaustive discussion of the subject, and he holds that the visit of an officer of a defendant bank, located at another state, who came here for the purpose of intervewing an officer of the Federal Reserve Bank in reference to business of his corporation, did not constitute evidence that the defendant is doing business in the state and was insufficient to justify the service of a summons. His comments on the cases of *Philadelphia & Reading* v. *McKibben*, 243 U. S., 264, *and Green* v. *The C. B. & Q. Railroad*, 205 U. S., 530, are apposite.

In *Pomeroy* v. *Hocking Valley Railroad*, 218 N. Y., 530, service was sustained, but it appeared that the defendant corporation met, by its board of directors and executive committee, *in the state of service*, and there exercised supervision over its management. The secretary permanently resided and had his office in New York City for the purpose of discharging his duties. The treasurer was similarly situated. Naturally it was held that this was doing business in New York. But at p. 538 it is said:

> "He (counsel) calls our attention to the reverse rule undoubtedly now established by the cases last cited, that jurisdiction cannot be thus obtained by service upon a foreign corporation not doing business within this state through delivery to an official thereof incidentally in the state."

Holzer v. *Dodge*, 233 N. Y., 216, April, 1922, appears to be the last word of the highest court of the State of New York on the subject and shows that that court now

completely defers to the principle that a corporation is not here by the presence of a visiting officer, even though he is here on the business of the corporation, and even though he comes here frequently. The corporation, as distinguished from the officer, must be established here, and see *Seaboard Fruit Distributors* v. *Carleton Moore, Inc.*, 199 A. D., 612 N. Y., First Dept., January 1922, holding squarely that a visit of an officer on business of the company, does not establish "doing business," basing its decision on *Tauza* v. *Susequehanna Coal Co.*, 220 N. Y., 267.

PART V.

Federal Courts other than Supreme Court.

The Federal District Courts and the old Circuit Courts have, for the most part, held to the rule that the corporation must be established in business in the state of service, and that the casual, temporary and even frequent visits of the executive officer to the state of service on the business of the corporation does not establish such doing business.

Suggestion that a corporation should not have a greater immunity from suit in that respect than private individuals, is not based on any sound comparison of the differences between a natural person and a corporation. Space forbids enlargement on that subject here, but a quotation is permissible from the case of *Noel Construction Co.* v. *George W. Smith & Co.*, 193 Fed. Rep., 492, Circuit Court of Maryland, December, 1911, Rose, *District Judge*, where he says, page 495:

"Individuals and corporations cannot be treated in all things alike, for the simple reason that they are, in fact, not alike. It is impossible to ignore some of the practical consequences of the difference between them. An individual can never be in more than one district at any one time. If he is actually in the district of the plaintiff's residence, he may be served there with process. A corporation is an untangible thing. It is never physically anywhere. It may be constructively present in many different districts at the same moment. It is also to be found in the district in which it is chartered. It makes no difference how much or how little business it there transacts. It is absent from all other districts in which it does not in any sense transact business. Its officers and agents for their own business or pleasure may go anywhere they will. They do not carry the corporation with them. It comes into a state so as to be liable to suit therein only when it is there doing business generally or specially. The defendant was not transacting business generally in Maryland at the time service was had upon its Vice-President. That it had sometime before been here engaged in business different to that out of which this suit grew, is immaterial."

In *Buffalo Glass Company* v. *Manufacturers' Glass Co.*, 142 Fed. Rep., 273, Circuit Court of N. Y., December, 1905, Hazel, *District Judge*, held squarely:

"That in order to give jurisdiction against the corporation, it must be actually and substantially engaged in business in the state of service. Its business must have been transacted by some agent or manager and that soliciting and obtaining orders for goods therein was not within the rule."

In this case, the defendant sold large quantities of glass in the state of service and entered into contracts for the sale of same; *held* that this did not constitute "actually and substantially" engaged in business basing such opinion on three decisions of this court.

Cody Motors Company v. *Warren Motors Car Company,* 196 Fed. Rep., 254 (District Court, N. Y., April 1912), Noyes, *Circuit Judge,* said:

> "The defendant leased space at the New York Auto Exhibition and defendant's officers were present conferring with different persons, including local sales agent. Held, it was not doing business."

Also see

Craig v. *Welch Motor Car Co.,* 165 Fed. Rep., 554.

Wilkins v. *Queens City Bank & Trust Co.,* 154 Fed. Rep., 173, Circuit Court, N. Y., Feb., 1907, Lacombe, Circuit Court, holding:

> "That the presence of an officer for the purpose of discussing a proposed settlement of a controversy, does not constitute doing business."

In the case of *Louden Machinery Co.* v. *American Malleable Iron Company,* 127 Fed. Rep., 1008 (1904), the above doctrine is again asserted.

United States v. *Bell Telephone Co.,* 29 Fed. Rep., 17, it is said here that three conditions must co-exist to give the Federal Court jurisdiction under these circumstances:

1. It must appear as a matter of fact, that the corporation is carrying on its business in such foreign state or district.

2. That such business is transacted or managed by some agent or officer appointed by and representing the corporation in the state.

3. * * * *

In *Smith* v. *Lineweaver*, 152 Fed. Rep., 730 (Eastern District of New York, 1907), it is stated:

> "A Federal Court can not acquire jurisdiction over a foreign corporation which is not doing business in the state of suit, and has no property within such state with relation to which the suit is brought by the service of process on an officer who is casually within the state, and the fact that the corporation maintains an office room within the state of suit, in charge of a salaried sales agent who takes orders for goods to be accepted and filled by the corporation at its home office does not constitute a doing business such as to validate the service."

See

Hoyt v. *Ogden & Portland Cement Co.*, 185 Fed. Rep., 189 (Northern District N. Y., 1911).

St. Louis Wire Mills Co. v. *Construction Barb Wire Co.*, 32 Fed. Rep., 802 (Missouri, 1887). Here the corporation was accustomed to make occasional purchases of raw materials by correspondence or sending an agent there for the purpose; but it never had a business office in Missouri, nor did it maintain an agent in that state. Service was made on a general manager while he is in Missouri on pleasure, although he made some purchases and attended to the settlement of a controversy. Held service not good. This case is not distinguishable from the case at bar.

The case of *Good Hope* v. *Railway Barb Wire Fencing Co.*, 22 Fed. Rep., 635, makes a similar holding on similar facts, to wit, that occasional purchases in the State of New York, by sending an agent there for that purpose, but not maintaining any office or transacting business there, did not constitute "doing business."

To the same effect is *Carpenter* v. *Westinghouse Air Brake Company*, 32 Fed. Rep., 434 (Iowa); *Ostrander* v. *Deerfield Lumber Company*, 206 Fed. Rep., 540, Northern District of New York, 1913.

Another case holding that the officer, by coming into the state and transacting business consisting of discussing or settling a controversy, does not give jurisdiction is *Buffalo Sandstone Brick Co.* v. *American Sandstone Machine Co.*, 141 Fed. Rep., 211, Circuit Court of New York, October, 1912.

In the case of *Golden, Belknap & Schwartz* v. *Connorsville Wheel Co.*, 252 Fed. Rep., 904, Michigan, September, 1918, the defendant made contracts to purchase motors in the state of service, and they were to be delivered there *and a man employed by the corporation was stationed there to superintend the proper execution of the contracts on this work until completed, and the president come into the state of service* and while there discussed a controversy and discussed another business matter. Held that jurisdiction was not thereby conferred. The court says with great clarity on page 999:

> "The question as to the presence in the state of the agent upon whom service is sought to be made, must not be confused with the question as to the presence in the state of the foreign corporation itself. Unless such corporation is present

> in the state, of course no personal service can there be made upon it."

This case disposes completely of the contention made by the plaintiff-in-error that the purchase of goods constitutes "doing business." In the case at bar, the purchases were occasional and voluntary while in the cited case, they were pursuant to long-term contracts and yet this was held "not doing business."

In *Fletcher's Cyclopedia of the Law of Corporations* (1920) published by Callaghan & Co., Chicago, Ill., in Volume 9, Chapter 65, Section 6005, at page 10,202, and Section 6006 at page 10,208, the doctrine is put aptly as follows:

> "* * * that a foreign corporation is not doing business in the state, service of process upon an officer who happens to come into the state *whether on his own business or casually on business of the corporation is not service * * * and can give no jurisdiction* * * * (citing many cases)."

Carrying equipment into the state for the express purpose of a business exhibition is not doing business within the state.

> *U. S.* v. *Telephone Co.*, 29 Fed. Rep., 17.
> *Ostrander* v. *Deerfield Lumber Co.*, 206 Fed. Rep., 540, Northern District of New York, 1913.

The plaintiff-in-error has cited on page 13 of his brief the case of *Beech* v. *Kerr Turbine Co.*, 243 Fed., Rep., 711 (Ohio, April 1917). This case, however, is an authority in favor of the defendant-in-error, because the service was sustained upon a distinct finding that

the corporation actually was established in the state of service. Such a finding was made on the conflicting affidavits but the court distinctly says at page 711, "we are of the opinion that making a contract for the sale of goods in another state is not doing business in the latter state. An isolated or single sale of goods in another state *or even actual repetitions of such sales* would not be doing business within that state. The case cited by counsel for plaintiff as well as others herein reviewed support this conclusion. This is a different question from that here presented."

It is suggested that a corporation should not have a greater immunity than a natural person under these circumstances. This argument does not bear analysis, because were it carried to its logical conclusion, it would follow that a doctrine would be developed that would find its way into the state statutes to the effect that the agent of a natural person who comes into a state to transact business for that person could be served and that such service would be binding upon his principal. Counsel overlooks the circumstance that the corporation itself never leaves its domicile except in a purely fictional sense. It is and it remains always the creature of the sovereign that created it.

A review of these authorities, including those cited in the brief of the plaintiff-in-error, show that neither visits of this officer nor the fact that the purchases that they made here were F.O.B. New York sustain any claim of "doing business." The phrase "fob New York" has no more significance on this question than had the purchases consisted of articles which Mr. Brown could have carried with him. In no event can this be distorted to a doing of business here.

CONCLUSION.

The order made by Judge Hazel should be affirmed and the question certified (fols. 266-267) answered in the negative.

Respectfully submitted,

JACOB H. CORN, and
ISAAC SIEGEL,
Attorneys for Defendant-in-Error.

ROSENBERG BROS. & COMPANY, INC. *v.* CURTIS BROWN COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

No. 102. Argued November 16, 1922.—Decided January 2, 1923.

1. An order of the District Court quashing the summons in an action against a foreign corporation upon the ground that the defendant was not found in the State is in effect a final judgment, reviewable here under Jud. Code, § 238. P. 517.
2. Purchases of goods by a foreign corporation for sale at its domicile, and visits by its officers on business related to such purchases, are not enough to warrant the inference that it is present within the jurisdiction of the State where such purchases and visits are made; and service of summons on its president while temporarily in that State on such business is, therefore, void. P. 517.
3. The fact that the cause of action arose in the State of suit will not confer jurisdiction of a foreign corporation not found there. P. 518.

285 Fed. 879, affirmed.

ERROR to a judgment of the District Court quashing the summons, for want of jurisdiction, in an action against a foreign corporation.

Mr. George H. Harris for plaintiff in error.

Mr. Jacob H. Corn, with whom *Mr. Isaac Siegel* was on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Rosenberg Bros. & Company, Inc., a New York corporation, brought this suit in the Supreme Court of that State against Curtis Brown Company, an Oklahoma corporation. The only service of process made was by delivery of a summons to defendant's president while he was temporarily in New York. Defendant appeared specially; moved to quash the summons on the ground that the corporation was not found within the State; and, after evidence was taken but before hearing on the motion, removed the case to the federal court for the Western District of New York. There, the motion to quash was granted, upon the ground that the defendant was not amenable to the process of the state court at the time of the service of the summons. A writ of error was sued out under § 238 of the Judicial Code; and the question of jurisdiction was duly certified. The order entered below, although in form an order to quash the summons and not a dismissal of the suit, is a final judgment; and the case is properly here. *Goldey* v. *Morning News*, 156 U. S. 518; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406. Compare *The Pesaro*, 255 U. S. 216, 217.

The sole question for decision is whether, at the time of the service of process, defendant was doing business within the State of New York in such manner and to such extent as to warrant the inference that it was present there. *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264, 265. The District Court found that it was not. That decision was clearly correct. The Curtis Brown

Company is a small retail dealer in men's clothing and furnishings at Tulsa, Oklahoma. It never applied, under the foreign corporation laws, for a license to do business in New York; nor did it at any time authorize suit to be brought against it there. It never had an established place of business in New York; nor did it, without having such established place, regularly carry on business there. It had no property in New York; and had no officer, agent or stockholder resident there. Its only connection with New York appears to have been the purchase there from time to time of a large part of the merchandise to be sold at its store in Tulsa. The purchases were made, sometimes by correspondence, sometimes through visits to New York of one of its officers. Whether, at the time its president was served with process, he was in New York on business or for pleasure; whether he was then authorized to transact any business there; and to what extent he did transact business while there, are questions on which much evidence was introduced; and some of it is conflicting. But the issues so raised are not of legal significance. The only business alleged to have been transacted by the company in New York, either then or theretofore, related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the State. Compare *International Harvester Co.* v. *Kentucky*, 234 U. S. 579; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79. And as it was not found there, the fact that the alleged cause of action arose in New York is immaterial. Compare *Chipman, Limited* v. *Thomas B. Jeffery Co.*, 251 U. S. 373, 379.

Affirmed.